Supreme Court, U.S.

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No. _____

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1993

JAMES A. WALSH, Petitioner,

v.

UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is judicial review preclusion under the Clean Air Act, 42 U.S.C. Section 7607 (b)(2), an unconstitutional denial of due process as applied to prohibit an individual against whom the United States commenced an enforcement action seeking substantial civil penalties from challenging the validity of the regulations sought to be enforced against him and who (a) was neither in nor associated with anyone in the asbestos abatement business within 60 days of the date that the Asbestos NESHAP regulations were promulgated in 1984 and (b) raised the constitutional question and the validity issue as an affirmative defense in his answer to the United States' complaint filed in 1989?

2. May civil penalties under the Clean Air Act, 42 U.S.C. Sections 7412(c) and 7413(b), be imposed only where an emission

of air pollutants to the ambient air (i.e., air *outside* of buildings) is shown by a preponderance of the evidence, and the non-compliance with Asbestos NESHAP work practice standards is, all by itself, an insufficient basis upon which to impose penalties under the Act?

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I. REPORTS OF OPINIONS DELIVERED BELOW

The decision of the United States District Court for Western Washington, Thomas S. Zilly, Judge, is reported in United States v. Walsh, 783 F. Supp. 546 (W.D.Wash. 1991).

The decision of the United States Court of Appeals for the Ninth Circuit, Noonan, J., is reported in United States v. Walsh, 8 F.3d 659 (9th Cir. 1993).[1]

II. STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the Ninth Circuit Court of Appeals was filed October 26, 1993.

The jurisdiction of this Court is grounded upon 28 U.S.C. Section 1254(1) and Supreme Court Rule 13.1.

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[1] There are only two parties to the proceeding in the Ninth Circuit Court of Appeals that is sought to be reviewed by this Court. They are (a) the Petitioner James A. Walsh and (b) the United States of America.

III. STATUTORY AND REGULATORY PROVISIONS

A. *42 U.S.C. Section 7607(b) (1983)*:

"(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final

action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

B. ***42 U.S.C. Section 7413(b) (1983)***:

"The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may,

in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person--

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(3) violates section 7411(e), section 7412(c), section 1857c-10(g) of this title (as in effect before August 7, 1977), subsection (d)(5) of this section (relating to coal conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B of this subchapter (relating to ozone)[.]"

C. *42 U.S.C. Section 7412(c) (1983)*:

"(1) After the effective date of any emission standard under this section--

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source--

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment."

D. ***42 U.S.C. Section 7412(e) (1983)***:

"(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter (other than the provisions of this subsection)."

E. ***42 U.S.C. Section 7602 (1983)***:

"(g) The term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."

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"(k) The terms 'emission limitation' and 'emission standard' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction."

F. *40 C.F.R. Section 61.147 (1984)*:

"Each owner or operator to whom this section applies shall comply with the following procedures to prevent emissions of particulate asbestos material to the outside air:

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(c) Adequately wet friable asbestos materials when they are being stripped from facility components before the members are removed from the facility. In renovation operations, wetting that would unavoidably damage equipment is not required if the owner or operator:

(1) Asks the Administrator to determine whether wetting to comply with this paragraph would unavoidably damage equipment, and, before beginning to strip, supplies the Administrator with adequate information to make this determination; and

(2) When the Administrator does determine that equipment damage would be unavoidable, uses a local exhaust ventilation and collection system designed and operated to capture the particulate asbes-

tos material produced by the stripping and removal of the friable asbestos materials. The system must exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in [section] 61.154.

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(e) For friable asbestos materials that have been removed or stripped:

(1) Adequately wet the materials to ensure that they remain wet until they are collected for disposal in accordance with [section] 61.152; and

(2) Carefully lower the materials to the ground or a lower floor, not dropping or throwing them; and

(3) Transport the materials to the ground via dust-tight chutes or containers if they have been removed or stripped more than 50 feet above ground level and were not removed as unites or in sections."

G. ***40 C.F.R. Section 61.141 (1984)***:

"*Outside air* means the air outside buildings and structures."

H. ***40 C.F.R. Section 50.1(e) (1983)***:

"*Ambient air* means that portion of the atmosphere, external to buildings, to which the general public has access."

IV. STATEMENT OF THE CASE

BASES FOR FEDERAL COURT JURISDICTION

This case was originally brought in the District Court for Western Washington at Seattle by the United States against James A. Walsh seeking civil penalties and injunctive relief under the Clean Air Act, 42 U.S.C. Section 7401 et seq.[2]

The District Court had subject matter jurisdiction over this action pursuant to 42 U.S.C. Section 7413(b). The District Court's judgment was orally announced on November 20, 1991 and was formally entered on November 26, 1991.[3]

Walsh appealed the District Court's

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[2] The Clean Air Act was amended in 1990. However, the United States stipulated that the pre-1990 amendments version of the Clean Air Act would apply to this case.

[3] This judgment and the subsequent injunctive relief entered on January 6, 1992 completed the District Court's disposition of this matter with respect to all parties and all claims before it.

final judgment to the Ninth Circuit Court of Appeals by filing a notice of appeal in the District Court on January 15, 1992.[4] The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. Section 1291 and FRAP 4(a)(1).

LITIGATION BACKGROUND

This action was one of 13 suits that the United States commenced in 11 states on August 22, 1989 alleging violations of the Asbestos NESHAP.[5] Those 13 actions sought substantial civil penalties against 45 companies and individuals for allegedly

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[4] Because the United States is a party, the notice of appeal was timely filed under FRAP 4(a)(1).

[5] The "Asbestos NESHAP" refers to the National Emission Standards for Hazardous Air Pollutants under 42 U.S.C. Section 7412, and administrative regulations promulgated by the United States Environmental Protection Agency ("EPA") under 40 C.F.R. Part 61, Subpart M, relating to asbestos abatement projects.

violating the Asbestos NESHAP.[6]

This action was brought by the United States against (1) Savage Enterprises, Inc., a Washington corporation ("Savage Enterprises"),[7] (2) James J. Savage, individually and as an officer of Savage Enterprises ("Savage"),[8] and (3) James A. Walsh, individually and as an officer of

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[6] It is appropriate to note at this juncture that Walsh was the only non-owner corporate employee named in any of those various lawsuits commenced by the United States. The United States admits that (a) at no time did Walsh have any ownership interest in Savage Enterprises and (b) Walsh, individually or otherwise, has at no time had any ownership or leasehold interest in any of the buildings or projects associated with the United States' claims. Judge Zilly noted that our case was perhaps the first instance where the United States sought civil penalties against a non-owner for alleged violations of the asbestos NESHAP. United States v. Walsh, 783 F. Supp. 546, 553 (W.D.Wash. 1991).

[7] This action was commenced subsequent to Savage Enterprises' administrative dissolution and its filing for Chapter 7 bankruptcy.

[8] Subsequent to his purchasing all stock that had been issued to Judith E. Hjort, Savage became the sole shareholder in Savage Enterprises. This action was commenced subsequent to Savage's filing for Chapter 7 bankruptcy.

Savage Enterprises ("Walsh"). A consent decree was entered by the trial court on September 13, 1991 that resolved all of the United States' claims against Savage Enterprises and Savage.[9] Walsh remained as the only defendant in this action against whom the United States' claims had not been fully resolved prior to trial.

PROCEDURAL BACKGROUND

The United States originally sought to impose civil penalties against Walsh that could total almost $4.25 million,[10] alleging (1) seven different projects that had Asbestos NESHAP violations and (2) one

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[9] The September 13, 1991 consent decree required Savage to pay $5,000.00 in twenty equal quarterly installments. This payment constituted full satisfaction of all United States' claims against Savage and Savage Enterprises.

[10] The United States originally alleged that Walsh violated the Asbestos NESHAP over a period spanning at least 170 days. The maximum civil penalty is $25,000 per day for each violation. 42 U.S.C. Section 7413(b).

violation of an EPA order.[11] Walsh filed a motion for summary judgment and, on May 30, 1991 the trial court dismissed two of the United States' claims.[12] Several days prior to trial, the government voluntarily dismissed two more claims.[13] Following five days of trial, Judge Zilly dismissed two more claims,[14] but found Walsh liable

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[11] The United States originally alleged that Walsh violated the August 15, 1985 Compliance Order and Request for Information (No. 1085-08-30-113/114) issued by the EPA to Savage Enterprises and Rainier Bank. However, Walsh was not individually named as a party in the Order.

[12] The two claims dismissed on summary judgment by the trial court were (a) the alleged Asbestos NESHAP violations at the Kent School District's O'Brien School because the United States failed to present any proof that Savage Enterprises stripped and removed more than the regulatory threshold quantity of friable asbestos at the facility and (b) the EPA Compliance Order because Walsh was not a party subject to the Order.

[13] These claims stemmed from alleged Asbestos NESHAP violations occurring at the Rainier National Bank's branch office in the Everett and at the 2121 Terry Avenue office building in Seattle.

[14] These claims stemmed from alleged Asbestos NESHAP violations occurring at the Northshore School District's Woodinville/Sorenson School and at the 1104 N.E. 47th Street apartment building.

on two claims.[15] Thus, when all was said and done, Walsh prevailed on six of the eight claims originally brought against him by the United States.

PROMULGATION OF THE ASBESTOS NESHAP REGULATIONS

The Asbestos NESHAP regulations[16] that apply to our case were promulgated as a final rule by the EPA Administrator on April 5, 1984. 49 Fed. Reg. 13658 (April 5, 1984). Sixty days thereafter was June 4, 1984. This was a full **9 months** *prior to* the date that your Petitioner, James A. Walsh, first became involved in or in any way associated with the asbestos abatement business. It was not until August 22,

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[15] These claims stemmed from alleged Asbestos NESHAP violations occurring at the Seattle-Tacoma International Airport ("Sea-Tac Airport") and at the Washington State Department of Transportation's Crab Pot Restaurant in Seattle ("Crab Pot"). Walsh was ordered to pay a civil penalty of $3,000.

[16] 40 C.F.R. Part 61, Subpart M (National Emission Standards for Asbestos).

1989 that Walsh, confronted with an unbelievably staggering potential civil liability in the form of monetary penalties imposed under a strict liability law, in fact had any reason whatsoever to raise in any forum the questions he now presents to this Court for resolution.

THE ASBESTOS NESHAP PROVISIONS OF THE CLEAN AIR ACT ARE ENFORCED AS A STRICT LIABILITY PENAL LAW

The Asbestos NESHAP is a ***strict liability*** law.[17] Strict liability penal laws are subject to (1) the rule of lenity even though only civil penalties are imposed,[18]

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[17] United States v. Sealtite Corporation, 739 F. Supp. 464, 468 (E.D.Ark. 1990).

[18] Crandon v. United States, 494 U.S. 152, 168, 108 L.Ed.2d 132, 110 S.Ct. 997 (1990); H. J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 255, 106 L.Ed.2d 195, 109 S.Ct. 2893 (1989) (Scalia, J., concurring); Federal Communications Commission v. American Broadcasting Company, 347 U.S. 284, 296, 98 L.Ed. 699, 74 S.Ct. 593 (1954); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 955-56 (D.C.Cir. 1990); First National Bank of Gordon v. Department of the Treasury, 911 F.2d 57, 65 (8th Cir. 1990).

and (2) other general rules of statutory construction intended to afford the person against whom the government seeks to impose monetary penalties fairness and substantial justice, i.e., ***due process***.[19]

> It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 387-88, 92 L.Ed. 10, 68 S.Ct. 1 (1947) (Jackson, J., dissenting).

CONSTITUTIONAL CHALLENGE TO REVIEW PRECLUSION RAISED IN WALSH'S ANSWER

In Walsh's answer to the government's complaint for civil penalties under the Clean Air Act, 42 U.S.C. Sections 7413(b)(3) and 7412(c)(1), he asserted as an affirmative defense that the Act's review

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[19] U. S. Const. amend. V. See, e.g., 70 C.J.S. Penalties Sections 2 and 5 (1987).

preclusion provision, 42 U.S.C. Section 7607(b), was unconstitutional as applied:

> 15. Because 42 U.S.C. Section 7607(b)(2) purports to prevent Walsh from raising certain defenses in this action, Walsh asserts that such statute is unconstitutional as applied to him as a denial of due process and equal protection.
>
> 16. Walsh asserts that the regulations alleged by the USA to have been violated by him in his individual and/or his alleged corporate capacity are invalid and/or void as arbitrary or capricious, contrary to law and/or adopted in excess of the statutory authority of the Environmental Protection Agency under the Clean Air Act, 42 U.S.C. Section 7401 et seq. Accordingly, the USA is not entitled to the relief sought against Walsh as an individual and/or in his alleged corporate capacity.

Answer And Defenses Of Defendant James A. Walsh.[20]

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[20] U.S. Const. amend. V. Worthy of notice, Walsh's answer was filed in the U.S. District Court for Western Washington *within 60 days* from the date that the government served its complaint upon him.

WALSH CONTENDS THAT MORE THAN NONCOMPLIANCE WITH WORK PRACTICE STANDARDS IS REQUIRED BY LAW TO IMPOSE CIVIL PENALTIES UNDER THE CLEAN AIR ACT

In both the District Court and the Court of Appeals, Walsh continued to raise his challenge to the application of the Asbestos NESHAP to him by asserting that there can be no violation of the Clean Air Act by the mere noncompliance with work practice standards and that in order to impose civil penalties under the Act, the government must prove by a preponderance of the evidence that there is *both* (1) the violation of a work practice standard and (2) the emission of asbestos to the air outside of the buildings within which the asbestos abatement work was conducted.

GOVERNMENT FAILED TO PROVE THAT THERE WAS AN EMISSION OF ASBESTOS TO THE AMBIENT AIR AS REQUIRED TO BE SHOWN FOR A VIOLATION OF THE CLEAN AIR ACT'S SECTION 7412(C)(1)

Walsh introduced evidence during the

trial that clearly demonstrated that there was no proof of any emissions of asbestos materials to the ambient air at the Sea-Tac Airport and the Crab Pot Restaurant projects. No where in any of the official written inspection reports kept by any of the government inspectors who testified in this case is there any eyewitness account or any measurements made of any (1) dust emissions during the course of stripping or removal work or (2) visible emissions of asbestos-containing material to the air outside of the buildings within which Savage Enterprises was stripping and removing asbestos.[21] There also are no

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[21] There are absolutely no air monitoring results indicative of (or even remotely in the same ball park as) "dry removal" of asbestos. Nor are there any measurements taken of the ambient air showing any emissions of asbestos during the course of stripping and removal. Likewise, there are no measurements taken of the ambient air prior to Savage Enterprises undertaking its abatement work to establish the background levels of asbestos, if any, at either Sea-Tac Airport or the Crab Pot.

written records that describe either (1) breaches in the negative air enclosure or (2) any asbestos-containing material lying *outside* of any building. The absence of any *written* recordings of these events is competent evidence of the *non-occurrence* of such events.

> [I]f a duty exists to record certain matters when they occur, and if no record of such matters is found, then the absence of any entry about them is evidence that they did not occur; or, to put it another way, the record, taken as a whole, is evidence that the matters recorded, and those only occurred.

4 Weinstein's Evidence, Hearsay Section 803(10)[01] (1988). Thus, in the trial court record is substantial competent evidence contrary to the trial court's erroneous finding that emissions occurred and proves that (1) no dust emissions during stripping and removal operations ever in

fact occurred[22] and (2) no emissions of asbestos to the ambient air ever in fact occurred.[23]

Nonetheless, both the District Court and the Court of Appeals ruled that liability under the Clean Air Act was grounded on the mere noncompliance with the work practice standards set forth in the Asbestos NESHAP and the emission of air pollutants to the ambient air need not be proven for the United States to impose civil penalties upon Walsh. The lower courts took this position notwithstanding the clear and unambiguous requirements of 42 U.S.C. Section 7412(c)(1).

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[22] Thus, all of the asbestos that Savage Enterprises stripped and removed at Sea-Tac Airport and the Crab Pot Restaurant was "adequately wetted" as required by the Asbestos NESHAP regulations.

[23] Walsh contends that there can be no violation of the Clean Air Act nor the imposition of civil penalties stemming from the mere technical violation of work practice standards.

THE CLEAN AIR ACT REQUIRES BOTH (1) NON-COMPLIANCE WITH WORK PRACTICE STANDARDS AND (2) THE EMISSION OF AIR POLLUTANTS TO THE AMBIENT AIR, AS LEGAL PREREQUISITES TO THE IMPOSITION OF MONETARY PENALTIES

The Asbestos NESHAP regulations set forth in 40 C.F.R. Part 61, Subpart M, are not *self-executing*. No where in the Clean Air Act is the mere non-compliance with work practice standards made a violation of law for which civil penalties may be imposed. The Clean Air Act **requires** that there be an ***emission*** in violation of an ***emission standard*** in order for penalties to be imposed upon an owner or operator. The courts have thus misconstrued the interrelationship of work practice standards, as emission ***standards***, and the enforcement provisions of the Clean Air Act, that mandates an ***emission*** of an air pollutant into the ***ambient air*** in violation of an emission standard as a ***prerequisite***

to imposing penalties under the Act.[24]

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[24] There is one reasoned decision that for only a brief time addressed the "linkage doctrine". United States v. MPM Contractors, Inc., 31 ERC 1550 (D.Kan. 1990), vacated on reconsideration, 32 ERC 1276 (D.Kan. 1990). Walsh has asserted that the underlined words correctly state the rule of law that more than mere technical violation of the Asbestos NESHAP work practice standards must be shown in order to violate the Clean Air Act:

> [The United States] must prove causation. In articulating the essential elements of plaintiff's claims against MPM, the court is aware both of plaintiff's desire to prevent harm to the environment before it takes place and of MPM's desire not to be fined for an inchoate violation of section 61.147. With these considerations in mind, we hold that plaintiff must show that, under the specific conditions observed and documented at [the various sites], defendant either did cause or, but for the corrective action ordered by the [government] inspectors, would have caused particulate asbestos material to be emitted to the outside air during removal (to establish a violation of Section 61.147(c)) or after removal (to establish a violation of Section 61.147(e)).

MPM Contractors, 31 ERC at 1552 (emphasis added). This "linkage doctrine" is premised upon the simple fact that the Asbestos NESHAP regulations **are not self-executing** with respect to the imposition of civil penalties. Without the emission of air pollutants to the ambient air, **there is no basis in law for imposing civil penalties merely for non-compliance with the work practice standards**.

THE NINTH CIRCUIT COURT OF APPEALS RULED THAT WALSH WAS PRECLUDED BY OPERATION OF 42 U.S.C. SECTION 7607(B) FROM CHALLENGING THE ASBESTOS NESHAP AND THE MANNER IN WHICH THOSE LAWS WERE APPLIED TO HIM

Walsh's contention that the Clean Air Act requires more than mere non-compliance with work practice standards fell on deaf ears. The District Court held that the emission of asbestos to the ambient air need not be proven and that all that the law requires is proof of the violation of the work practice standards.[25] On appeal, however, the government finally interposed an objection to Walsh's linkage contention on the ground that he was precluded from challenging the validity of the Asbestos NESHAP regulations by operation of 42

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[25] The District Court allowed Walsh to present evidence and legal argument in support of his theory that the government could not prevail without proof of asbestos emissions to the ambient air. Thus, the District Court sidestepped the issue presented by 42 U.S.C. Section 7607(b) and avoided the constitutional confrontation raised by Walsh in his answer.

U.S.C. Section 7607(b)(2). The Court of Appeals during oral arguments expressed reservation about applying such a judicial review preclusion statute to Walsh under circumstances where the regulations were admittedly promulgated at a time when he was not even in the asbestos business and, therefore, lacked standing or any reason whatsoever to contest them. Nonetheless, the Court of Appeals ultimately decided that 7607(b) barred its intervention at this juncture and declined to review the linkage issue raised by Walsh.[26]

> None of Walsh's arguments as to the substantive violations of the Act are without force.

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[26] The Ninth Circuit Court of Appeals declined to rule on Walsh's contentions based upon what it perceived to be the "uncontested fact" that there were other asbestos abatement businesses in operation during the 60 day review period following the Asbestos NESHAP regulations' promulgation in 1984 that could have sought review had they so desired. However, ***Walsh was involved in a restaurant at that time and did not have any association with any asbestos abatement business.***

> Nonetheless, none of them in the end are persuasive. We consider them in turn with this preamble: Congress has provided that judicial review of the standards set by the EPA must be sought only in the United States Court of Appeals for the District of Columbia within 60 days of the notice of promulgation of the standards. 42 U.S.C. [Section] 7607(b). Walsh challenges this limitation on judicial review, noting that he himself was not even in the asbestos removal business at the time the regulations were promulgated. We take judicial notice, however, that there were many asbestos removal companies in operation at the time of the promulgation of the regulations and that they had motive and opportunity to challenge the regulations if they were unreasonable. There is nothing to prevent Congress from providing a single national forum for the litigation of such standards. Adamo Wrecking Co. v. United States, 434 U.S. 275, 284 (1978).

United States v. Walsh, 8 F.3d 659, 664

(9th Cir. 1993).[27] The Court of Appeals thus slammed its judicial door in Walsh's face.

CASE STATEMENT SUMMARY

Walsh has properly raised the linkage issue that exists for the imposition of civil penalties under the Clean Air Act for the alleged violation of work practice standards and has preserved it for review

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[27] The Court of Appeals took the liberty of taking "judicial notice" of the "fact" that there were purportedly many asbestos removal companies in operation in 1984 that had motive and opportunity to seek promulgation review in the D.C. Circuit Court of Appeals. Judicial notice is appropriate only where the "fact" noticed is not subject to dispute and can be readily ascertained. Fed. R. Evid. 201(b). There was absolutely no testimony ever taken or reference made during trial or at any other stage as to the number of asbestos removal companies in operation in 1984. Walsh has no way of knowing the accuracy of this statement. More important, Walsh was in no way in privity with or in any manner associated with such businesses in 1984. Thus, Walsh had absolutely no *standing* to seek promulgation review in the D.C. Circuit in 1984. 42 U.S.C. Section 7607(b)(1) did not alter the fundamental rules regarding the judicial review of administrative actions and the need for a proper party to challenge such actions; i.e., standing. See Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 507 F.2d 905, 908-909 (9th Cir. 1974).

by this Court. This Court should seize the opportunity to delve into this issue with the scrutiny that it and the people who are and will be affected by government enforcement of the NESHAP regulations truly deserve.

V. ARGUMENT IN SUPPORT OF ISSUANCE OF A WRIT OF CERTIORARI

BASIS FOR SEEKING ISSUANCE OF WRIT

Walsh respectfully asks this Court to issue a writ of certiorari and review the Ninth Circuit Court of Appeal's decision in this case because, holding as it did that the review preclusion provisions of the Clean Air Act prohibited its consideration of Walsh's challenge to the manner in which the Asbestos NESHAP regulations were being construed and applied to him under his unique circumstances, the Court of Appeals

"*decided an important question of federal law which has not been, but should be, settled by this Court.*" Supreme Court Rule 10.1(c) (italics added).

MODERN REVIEW PRECLUSION UNDER THE CLEAN AIR ACT AND OTHER ACTS HAS NEVER BEEN SQUARELY ADDRESSED BY THIS COURT

This Court has clearly acknowledged that there exists a serious constitutional issue with respect to the Clean Air Act's judicial review preclusion provision under 42 U.S.C. Section 7607(b)(2).

> If the constitutional validity of [Section] 307(b) of the Clean Air Act had been raised by petitioner, I think it would have merited serious consideration.

Adamo Wrecking Co. v. United States, 434 U.S. 275, 289, 54 L.Ed.2d 538, 98 S.Ct. 566 (1978) (Powell, J., concurring). Nonetheless, this Court has sidestepped a confrontation with the review preclusion

issue thus far by concluding that either the issue was not properly raised by the petitioner or that it need not be resolved in the particular case under review.

> The respondents also argue that a literal construction of [Section] 307(b)(1) would violate due process of law. This argument turns on the interrelationship between [Section] 307(b)(1) and its companion provision, [Section] 307(b)(2) . . . . To preclude a defendant in a civil or criminal enforcement proceeding from attacking the validity of informal action on the part of the Administrator would, in the respondents' view, violate the defendant's due process right to a "reasonable opportunity to be heard and present evidence." Yakus v. United States, 321 US 414, 433, 88 L Ed 834, 64 S Ct 660, 28 Ohio Ops 220. *The short answer to the respondents' argument is that the validity of [Section] 307(b)(2) is not at issue here.* ***The constitutional question raised by the respondents must, therefore, await another day.***

Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 n. 9, 64 L.Ed.2d 525, 100 S.Ct.

1889 (1980) (emphasis and italics added). Justice Powell continued to express his strong reservations with respect to the constitutionality of the review preclusion provisions of the Clean Air Act's Section 7607(b)(2). Harrison, 446 U.S. at 594 (Powell, J., concurring).

ALTHOUGH LOWER COURTS EXPRESS CONCERN OVER THE "NAGGING PRESENCE OF A SUBSTANTIAL DUE PROCESS QUESTION" RAISED BY THE REVIEW PRECLUSION PROVISIONS OF THE CLEAN AIR ACT AND OTHER ACTS OF CONGRESS, THEY HAVE NONETHELESS ALSO SIDESTEPPED A DIRECT CONSTITUTIONAL CONFRONTATION BY RESORT TO TECHNIQUES OF NARROW CONSTRUCTION

The lower courts have recognized that the review preclusion provisions in Acts of Congress[28] pose a "nagging presence of

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[28] The Clean Air Act's Section 7607(b)(2) is not unique. Other Acts of Congress also contain similar judicial review preclusion provisions. See 42 U.S.C. Section 4915(a) (Noise Control Act); 33 U.S.C. Section 1369(b)(2) (Federal Water Pollution Control Act); 42 U.S.C. Section 6976 (Solid Waste Disposal Act); 42 U.S.C. Section 9613(a) (CERCLA).

a substantial due process question".[29] Nonetheless, these courts too have effectively avoided resolving the constitutional issue posed by review preclusion provisions by either sidestepping it altogether[30] or by narrowly construing the circumstances under Section 7607(b)(1) which would give rise to review preclusion under 7607(b)(2).[31]

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[29] Chrysler Corporation v. Environmental Protection Agency, 600 F.2d 904, 913 (D.C. Cir. 1979).

[30] "The Supreme Court has previously taken note of the constitutional problems that review limitations such as Section 307(b) may present. See, e.g., Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 n. 9, 100 S.Ct. 1889, 1897 n. 9, 64 L.Ed.2d 525 (1980) (opinion of the Court); id. at 594-95, 100 S.Ct. at 1898-99 (Powell, J., concurring opinion); Adamo Wrecking Co. v. United States, 434 U.S. 275, 289-91, 98 S.Ct. 566, 575-76, 54 L.Ed.2d 538 (1978) (Powell, J., concurring opinion). ***The issue, however, has not thus far arisen in a posture that would permit its resolution, nor does it so arise in this case.***" General Motors Corporation v. Ruckelshaus, 724 F.2d 979, 984 n. 30 (D.C. Cir. 1983) (emphasis and italics added).

[31] District of Columbia v. Train, 533 F.2d 1250 (1976) (challenge to a consent agreement does not trigger 307(b)(1) jurisdiction); West Penn

(continued...)

THIS COURT'S DECISION IN *YAKUS V. UNITED STATES* APPEARS TO BE THE COURT'S LAST REAL EFFORT AT PASSING ON THE CONSTITUTIONALITY OF THE REVIEW PRECLUSION QUESTION

The singular prior decision of this Court that has seemingly formed a road-block to a concerted effort aimed at a formal and final resolution of the review preclusion constitutional question raised herein is that of Yakus v. United States, 321 U.S. 414, 88 L.Ed. 834, 64 S.Ct. 660 (1944). In Yakus, this Court held that the review preclusion provisions of the 1942 Emergency Price Control Act were not, under the war-time circumstances in which

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[31](...continued)
Power Co. v. Train, 522 F.2d 302, 309 (3rd Cir. 1975), cert. denied, 426 U.S. 947 (1976) (action for declaratory judgment that power company was not violating sulfur emission standards was a challenge to methods of compliance, not to plan itself, and thus did not constitute challenge to approval or promulgation of implementation plan); Utah International, Inc. v. E.P.A., 478 F.2d 126 (10th Cir. 1973) (challenge to an EPA order disapproving previously approved portions of state plan did not constitute challenge to approval or promulgation of implementation plan).

the Act was passed and in the particular application under consideration by the Court at the time, unconstitutional:

> Such a procedure [i.e., resort to a single court for the purpose of contesting the validity of regulations within a set period of time], ***so long as it affords to those affected a reasonable opportunity to be heard and present evidence***, does not offend against due process.

Yakus, 321 U.S. at 433 (emphasis and italics added). The dissenting opinions in the Yakus decision were both eloquent and pointed:

> It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found

> to circumvent the supreme law and, what is more, to make the courts parties in doing so. This Congress cannot do. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process . . . .

Yakus, 321 U.S. at 468 (Rutledge, J., dissenting).[32] What can only be deemed as "crystal ball" precision, Justice Rutledge accurately prognosticated the inclusion of review preclusion provisions by Congress in subsequent enactments:

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[32] Yakus was a case in which the criminal enforcement-prong of review preclusion was addressed. Nonetheless, the dissenting opinion still bears a strong message as it relates to Walsh's case. Albeit not a criminal proceeding, the government sought to enforce civil penalties under a ***strict liability*** law and regulations--i.e., a ***penal*** set of laws.

> Once approved [i.e., judicial review preclusion], it is bound to spawn progeny.

Id. at 483. It has indeed!

THIS COURT AND OTHERS HAVE ACKNOWLEDGED THAT THE *YAKUS* HOLDING AFFIRMING THE REVIEW PRECLUSION PROVISION OF THE 1942 EMERGENCY PRICE CONTROL ACT IS ARGUABLY DISTINGUISHABLE FROM SIMILAR PROVISIONS UNDER THE CLEAN AIR ACT AND OTHER NON-WAR POWER ACTS OF CONGRESS

This Court has acknowledged that the holding of Yakus may now be outdated and, thus, deserving of a new look:

> Although I express no considered judgment, I think Yakus is at least arguably distinguishable. The statute there came before the Court during World War II, and it can be viewed as a valid exercise of the war powers of Congress under Art I [Section] 8 of the Constitution. . . . As important as environmental concerns are to the country, they are not comparable--in terms of an emergency justifying the short-cutting of normal due process rights--to the need for national mobilization in wartime of economic as well as military activity.

Adamo Wrecking, 434 U.S. at 290 (Powell, J., concurring).[33] Fifty years of living under Yakus has been much too long a time for such an important constitutional issue to remain unrevisited by this Court.

THE *YAKUS* DECISION HAS BEEN THE FOUNDATION FOR SUBSEQUENT APPELLATE COURT DECISIONS APPLYING THE REVIEW PRECLUSION PROVISIONS OF THE CLEAN AIR ACT

The Ninth Circuit Court of Appeals relied on United States v. Ethyl Corp., 761 F.2d 1153 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986), in concluding that "it is too late for Walsh to challenge [the Asbestos NESHAP regulations] in this enforcement proceeding." Walsh, 8 F.3d at 664. The Ethyl Corp. court, as other courts before it, based its decision to decline review of EPA's regulations during a civil enforcement

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[33] See also Chrysler Corporation, 600 F.2d at 913.

proceeding upon this Court's holding in Yakus. Ethyl Corp., 761 F.2d at 1156-57.

THE CIRCUMSTANCES IN BOTH *YAKUS* AND *ETHYL CORP.* ARE CLEARLY AND CRITICALLY DISTINGUISHABLE FROM THE CIRCUMSTANCES IN WALSH'S CASE--DISTINCTIONS THAT ARE MOST DEFINITELY WORTHY OF A DIFFERENT OUTCOME

It is ***absolutely critical*** to note, however, that in the Ethyl Corp. case ***as in the Yakus case***, the defendants against whom the government was enforcing its regulations ***were in fact actively engaged in the regulated business at the time the regulations were passed***. In Yakus, the individuals against whom enforcement was commenced did not seek review, although they had reason and opportunity to do so. In Ethyl Corp., the court specifically noted that each of the companies against whom the EPA commenced enforcement actions was on actual notice and participated in the comment proceedings that accompanied

the promulgation of the regulations.[34] To preclude review under these circumstances may be appropriate.[35] However, in direct contrast to the defendants in Yakus and Ethyl Corp., Walsh neither (1) was in the asbestos abatement business at the time the Asbestos NESHAP regulations were promulgated nor (2) had actual notice of and participated in the comment period. Due process is patently offended by precluding an individual, such as Walsh, from raising a challenge to invalid regulations during an enforcement proceeding seeking substantial penalties under such circumstances.[36]

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[34] Ethyl Corp., 761 F.2d at 1157 n. 8.

[35] Review preclusion under such circumstances would thus be akin to the review preclusion doctrines of res judicata and collateral estoppel.

[36] By analogy, Walsh's lack of participation in a civil lawsuit would not preclude him from raising issues of law that had been litigated therein provided he was not in privity with or substantially related to one of the actual parties (continued...)

INDIVIDUALS HAVING NO OWNERSHIP INTEREST IN THE ASBESTOS ABATEMENT BUSINESS FOR WHOM THEY ARE EMPLOYED ARE NOW CLEARLY AT RISK OF FACING SUBSTANTIAL MONETARY PENALTIES IMPOSED UPON THEM UNDER A STRICT LIABILITY LAW AND REGULATIONS

According to the Regional Counsel's office for the Environmental Protection Agency in Seattle:

> The Walsh case is the first time the courts have clearly stated that someone who works for an asbestos contractor, but who does not have an ownership interest in the company, is liable for violations of the federal asbestos rules on premises undergoing renovation or demolition. The decision to uphold the precedent setting 1991 ruling [of the U.S. District Court] puts employees of asbestos abatement contractors on notice that they, too, face judgments against them if they are responsible for violations of the regulations.

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[36](...continued)
involved in the lawsuit. Clearly, "*it is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.*" Parklane Hosiery Company v. Shore, 439 U.S. 322, 327 n. 7, 58 L.Ed.2d 552, 99 S.Ct. 645 (1979) (emphasis and italics added).

EPA News Release 93-81 (December 20, 1993).

Now, more clearly than ever, non-owner employees will be held liable for monetary penalties under the Clean Air Act. However, unless this Court decides to review the questions raised by Walsh in this Petition, they will all face such penalties with not one hand, but both hands tied behind their backs because they cannot challenge the very regulations that they are now alleged to have violated simply because they did not do so in 1984 or whenever the pertinent regulations were promulgated! Such inequity cries out as foul and as patently unfair when applied blindly, without regard to the specific and unique circumstances of each case! Due process is offended in a manner that is clear and unequivocal:

> Due process . . . [deals with] the denial of that "fundamental fairness, shocking to the universal sense of justice." Betts v. Brady, 316 US 455, 462, 86 L ed 1595, 1601, 62 S Ct 1252 (1942).

Kinsella v. United States, 361 U.S. 234, 246, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960).

THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES PREVIOUSLY HAS CONCLUDED THAT REVIEW PRECLUSION IS AN UNUSUAL AND UNNECESSARY HARSH RESTRICTION ON THE RIGHT TO CHALLENGE THE VALIDITY OF A REGULATION TO WHICH ONE IS SUBJECT

The Administrative Conference of the United States[37] originally concluded that "the express preclusion of review at the enforcement stage creates a highly unusual and unnecessary harsh restriction on the

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[37] The Administrative Conference of the United States is a permanent independent administrative agency of the Federal Government whose purpose is to "develop improvements in the legal procedures by which Federal agencies administer regulatory, benefit, and other Government programs." 1 C.F.R. Section 301.2 (1993). This forum is intended to produce recommendations for "improving the fairness and effectiveness of such procedures." Id.

right to challenge the validity of a regulation to which one is subject." 41 Fed. Reg. 56767, 56768 (December 30, 1976).[38] In fact, the Conference specifically called upon Congress to amend the offensive Acts "to allow the validity of a regulation to be challenged in defense to an enforcement proceeding." Id. at para. D(1).

This view has been echoed in writings by learned scholars. See Currie, Judicial Review Under Federal Pollution Laws, 62 Iowa L. Rev. 1221 (1976-77). Professor Currie recognized that review preclusion would operate so as to "make invalidity unavailable as a defense to persons who went into the affected business, moved into the affected area, or indeed were born after the [specified review time]

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[38] Codified in 1 C.F.R. Section 305.76-4.

period." Id. at 1258. The affront to due process principles is obvious. Professor Currie urged that "as implied in Yakus, to impose sanctions upon one who has never had a fair opportunity to challenge the regulation under which he is charged is to deprive him of property without due process of law." Id. at 1259.[39]

Even in its 1982 reassessment of the judicial review preclusion question, the Administrative Conference still recommended to Congress that it amend its Acts so as to lessen the harsh results and unfairness that stem from the blind application of review preclusion to every individual who is subject to an enforcement action:

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[39] "That the congressional authority over federal-court jurisdiction cannot be so exercised as to deny constitutionally guaranteed rights I consider established by United States v. Klein, 80 U.S. (13 Wall) 128 (1872); accord, Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948)." Currie, 62 Iowa L. Rev. at 1259 n. 268.

> When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement (subject to the principles of collateral estoppel and stare decisis).

47 Fed. Reg. 58208, 58210 (December 30, 1982).[40]

Congress has thus far not taken the Administrative Conference's recommendations to heart. Nonetheless, based on the above-presented arguments embodying well-established principles of due process, equal protection, and the separation of

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[40] Codified in 1 C.F.R. Section 305.82-7.

powers, this Court should squarely confront the review preclusion question and finally resolve the issues presented in this Petition For Writ Of Certiorari.

THE CLEAN AIR ACT CLEARLY REQUIRES THAT AN EMISSION OF AN AIR POLLUTANT TO THE AIR OUTSIDE OF BUILDINGS MUST BE SHOWN AS A PREREQUISITE TO IMPOSING CIVIL PENALTIES UPON ANY PERSON

What makes the review preclusion question raised by Walsh in this case even more imperative to be resolved by this Court is the glaring misinterpretation of the Clean Air Act's enforcement provisions where NESHAP work practice standards are involved. All of the District Courts, save one but only for a brief moment, have construed the Asbestos NESHAP provisions of the Clean Air Act in such a manner as to make civil penalties self-executing upon a mere showing that the work practice standards have been violated. Only once

in the Clean Air Act's history prior to Walsh's case has the specific issue raised by Walsh even been tangentially mentioned by a Court of Appeals. In United States v. Louisville Edible Oil Products, Inc., 926 F.2d 584 (6th Cir. 1991), in a most curious statement, and notably without any legal analysis, the Court of Appeals noted that "[a] conviction under the Clean Air Act requires the government to prove either that defendants emitted asbestos into the atmosphere or that they violated the work practice standards adopted by the Environmental Protection Agency."[41] However, the context in which the Sixth Circuit Court of Appeals made this observa-

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[41] Id. at 588 (emphasis added). In fact, the Court of Appeals stated merely that "[w]e agree with the conclusion reached by the district court" that violations are premised upon an either/or proposition. The district court decision in this case is set forth in United States v. Louisville Edible Oil Products, Inc., 773 F. Supp. 15 (W.D.Ky. 1990).

tion was a criminal enforcement action and a motion to dismiss on double jeopardy grounds. The Louisville Edible Oil decision is neither dispositive of the issue raised by Walsh nor is it persuasive authority due to its absolute paucity of legal analysis. However, and this should be judicially noted with raised eyebrows, the Sixth Circuit Court of Appeals' opinion does imply that emission of asbestos to the atmosphere will violate the Clean Air Act even in those instances where there *is* compliance with the work practice standards. Walsh's construction of the law, which he contends is the proper construction would require **both** (1) non-compliance with work practice standards **and** (2) emission of asbestos to the air outside of

buildings.[42]

In short, the "linkage" issue raised by Walsh has not yet been "officially" ruled on by any court. Where, as here, a strict liability law is being applied to subject businesses and individuals to substantial civil penalties, there arises a crying need for the judiciary to get actively involved in defining the proper construction and scope of the law. Recall that civil penalties are not favored in the law and that individuals should be punished only where the facts and the law are crystal clear.[43] Although the issues

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[42] Manifestly, the Clean Air Act is an *outdoor* air quality act, not an *indoor* air quality act. See, e.g., Idaho Department of Health and Welfare v. United States Department of Energy, 959 F.2d 149 (9th Cir. 1992).

[43] "Statutory provisions for penalties must be strictly construed, and . . . [i]t has been said that *such provisions must not be construed to include anything beyond their letter even though within their spirit.*" 70 C.J.S. Penalties Section 5 (emphasis and italics added).

arise in the public health arena, justice nevertheless demands reasonable application of the law where individuals are singled-out for punishment.[44]

The only way for this Court to address this question of statutory construction is to overcome the bar placed by the Clean Air Act's review preclusion provision set forth in 42 U.S.C. Section 7607(b)(2).

VI. CONCLUSIONS

The time for this Court to revisit the judicial review preclusion avalanche that was started with Yakus has finally come. Walsh has done everything within his power to set forth and preserve his

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[44] If the Clean Air Act itself may be construed to require more than mere technical violation of the Asbestos NESHAP regulations, then under the jurisprudence that has evolved with respect to strict liability statutes, this Court must give the benefit of any doubts to Walsh. Id. Cf. MPM Contractors, 31 ERC at 1552.

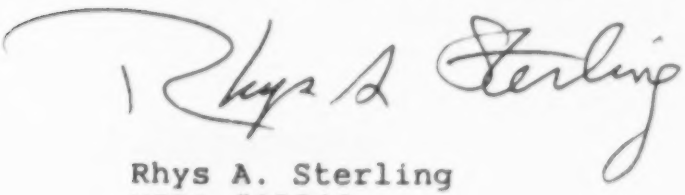
challenges to (1) the constitutionality of the review preclusion provision set forth in the Clean Air Act, 42 U.S.C. Section 7607(b)(2) and (2) the construction and application of the Asbestos NESHAP regulations in an enforcement proceeding seeking civil penalties. Due process principles, together with principles of separation of powers and equal protection, are substantially offended and violated by the blind application of review preclusion to Walsh under his circumstances.

We pray that this Court applies its discretion in recognition of all of these aspects and grants Walsh's Petition For Writ Of Certiorari to review the questions raised herein.

DATED this 5th day of January, 1994.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



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APPENDICES

APPENDIX A

CONSISTS OF THE FOLLOWING

11 PAGES (FRONT/BACK)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES WALSH, as individual and as officer of Savage Enterprise, Inc., *Defendant-Appellant.*	No. 92-35088 D.C. No. CV-89-01263-TSZ OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
September 3, 1993—Seattle, Washington

Filed October 26, 1993

Before: J. Clifford Wallace, Eugene A. Wright and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Environmental Law/Asbestos/Air

The court of appeals affirmed a judgment. The court held, among other things, that an on-site superintendant of an asbestos removal project could properly be found liable as an "owner or operator" of a renovation or demolition operation for violations of the Clean Air Act.

Savage Enterprises, Inc. engaged in removing asbestos from a location at the Seattle-Tacoma Airport (Sea-Tac) and from the Crab Pot restaurant, in Seattle. Appellee, the United States, filed a complaint against Savage Enterprises, against James Savage (the company's president) and appellant James Walsh (a supervisory employee), alleging violations of the Clean Air Act and the National Emission Standards for Hazardous Air Pollutants for asbestos (NESHAP). Savage Enterprises and James Savage entered into a consent decree.

Walsh was tried and found liable for failing to follow NESHAP procedures and for failing to insure that friable asbestos materials remained wet until collected for disposal. Walsh appealed, contending that he was not an "operator" within the meaning of the Act and that the government failed to establish that he had committed substantive violations of the Act.

[1] A relevant regulation defines as liable "any person who owns, leases, operates, controls, or supervises a stationary source." [2] On the Sea-Tac project, the district court found that Walsh had the ability to correct the work and had the necessary control to be an operator under the Act. [3] At the Crab Pot restaurant project, the district court found that Walsh held himself out as being in charge and was in fact in charge. [4] The district court correctly required substantial control in holding Walsh was the operator of these removal projects within the meaning of the Act.

[5] Walsh argued that emissions must reach the outside area. This argument does not disturb the validity of the regulations that he was found to have violated. The regulations were not subject to challenge in this proceeding. [6] Walsh also contended that there was no "modification" of a source that increased the amount of air pollutant emitted by the source because of his use of a negative air enclosure. [7] Sufficient evidence showed that the negative enclosure did not succeed in preventing emissions. [8] Finally, the district

court's conclusion that the asbestos material was friable and not adequately wetted was not clearly erroneous.

COUNSEL

Rhys A. Sterling, Hobart, Washington, for the defendant-appellant.

Andrew C. Mergen, Dept. of Justice, Environmental and Natural Resources Division, Washington D.C., for the plaintiff-appellee.

OPINION

NOONAN, Circuit Judge:

James A. Walsh appeals the judgment of the district court entered against him for violation of section 112 of the Clean Air Act (the Act), 42 U.S.C. § 7412 (prior to its November 15, 1990 amendment), and the National Emission Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. § 61, Subpart M (NESHAP) (prior to its November 20, 1990 amendment). There is little published appellate authority on the contentions raised in this appeal, and this case presents an opportunity to furnish more. We affirm the judgment.

STATUTE

The Act, 42 U.S.C. § 7412, authorizes the Administrator of the Environmental Protection Agency (EPA) to publish a list of air pollutants EPA determines to be hazardous and to describe the emission standards known as NESHAP for those pollutants. Asbestos was listed as a hazardous air pollutant and a NESHAP relating to asbestos was promulgated. See 140 C.F.R. § 61, Subpart M, providing for the procedures to be

followed in the removal and disposal of materials containing asbestos.

The Act provides that "any design equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter." 42 U.S.C. 7412(e)(5). The asbestos NESHAP requires the owner or operator of a renovation or demolition operation where there is at least 260 linear feet of friable asbestos materials on pipes or at least 160 square feet of asbestos on other components of the facility, to notify the EPA; to comply with certain procedures to prevent emission of particulate asbestos to the outside air; to adequately wet friable asbestos materials when they are being stripped; and to insure that the materials remain wet until they are collected for disposal. 40 C.F.R. § 61.145, .146 and .147.

PROCEEDINGS

On August 22, 1989 the United States filed a complaint against Savage Enterprises, Inc., against James Savage, and against Walsh, seeking civil penalties and injunctive relief under the Act, 42 U.S.C. § 7413, for seven violations of NESHAP, promulgated under section 112 of the Act, 42 U.S.C. § 7412. On September 13, 1991 the district court entered a consent decree resolving all claims against Savage Enterprises and James Savage. Walsh went to trial on November 14, 1991. Three charges were dropped prior to trial, and on two, after a five-day bench trial, the court entered judgment for Walsh.

The two charges as to which Walsh was found liable are as follows: (1) Between January 20, 1986 and April 15, 1986 he engaged in removal of friable asbestos at the Seattle-Tacoma Airport (Sea-Tac), Northwest Airlines offices, conducting a dry removal of asbestos without following the procedures prescribed for obtaining a waiver of the wetting requirement in

violation of 40 C.F.R. § 61.147(c), and in violation of the same regulation he failed to insure that friable asbestos materials at this site remained wet until collected for disposal. (2) As the operator of an asbestos removal at the Crab Pot restaurant, Pier 52, Seattle, between July 17, 1986 and September 22, 1986, Walsh failed to insure that friable asbestos materials remained wet until collected for disposal in violation of 40 C.F.R. § 61.147(e).

The court imposed a penalty of $3,500 and enjoined him from performing further asbestos-removal projects for a two-year period without complying with the Act and without notifying the EPA.

Walsh appealed, raising a variety of issues.

ANALYSIS

1. *Statute of Limitations*

Walsh contends that the action of the United States is an action for money damages brought by the United States and founded on a tort, so that the three-year tort statute of limitations applies, 28 U.S.C. § 2415(b). Walsh is in error. The government's action does not sound in tort but is for the enforcement of a civil penalty. The appropriate statute is the five-year statute of limitations. 28 U.S.C. § 2462.

2. *Selective Prosecution*

Walsh contends that he was singled out personally because Savage Enterprises entered bankruptcy without paying any civil penalties and his prosecution was the only way the government could "get even" with Savage Enterprises. Walsh's contention is unpersuasive. Savage Enterprises and its owner, James Savage, were the subject of the government complaint. At trial on the witness stand Walsh conceded that he had no

sense that he was being targeted. The contention of selective prosecution is without merit.

3. *Walsh's Liability As An Operator*

[1] Walsh, who admittedly was not the owner of Savage Enterprises, contends that he was not an operator within the meaning of the Act. He points to the preamble to the asbestos section of NESHAP, 49 Fed. Reg. 13657, 13659 (April 5, 1984), stating that only the renovation contractor on a project is intended to be held liable. The relevant regulations nonetheless define as liable "any person who owns, leases, operates, controls, or supervises a stationary source." 40 C.F.R. § 61.02. The district court interpreted the regulation to apply only to "a person having significant or substantial or real control and supervision over a project." Applying that definition, the district court found Walsh not to be liable as to two of the projects as to which the government had charged him. In making this determination, the district court found Walsh's testimony as to all four projects "to be very credible," whereas it found "in contrast Mr. Savage's testimony to be not credible."

The district court noted that Savage Enterprises had approximately 10 to 15 employees including its owner, James Savage, as well as other people serving in some management capacity. In the period of the charged violations, Walsh first served as an estimator for the company, then as vice president of Savage Enterprises, and from March of 1987 to November 1987 as the company's president. The district court found that throughout this period James Savage himself was "the ultimate person in control" and that the title given to Walsh was "not necessarily indicative" of his authority.

[2] On the Sea-Tac project from January 4, 1986 through April 15, 1986, Walsh had the title of estimator. He wrote the asbestos removal proposal to the general contractor for renovation work at Sea-Tac. He also signed the Notice of Intent

to Remove Asbestos and the Amended Notice. He met with a representative of the Puget Sound Air Control Pollution Authority on two occasions on which asbestos removal problems were discussed. He also dealt with an inspector for the Port of Seattle in relation to asbestos problems. On the basis of the testimony the district court concluded that Walsh "had the ability to correct the work, he was the person having the necessary control to be an operator under the statute."

[3] At the Crab Pot Restaurant Project at Pier 52 in Seattle, between July 17, 1986 and September 1986, Walsh was vice president of Savage Enterprises and responsible for the overall supervision of the project. He signed the Notice of Intent to Remove Asbestos. The foreman of the project, Van Pham, took directions from Walsh. If there were problems of calls by workers or inspectors, Walsh admits that he would have dealt with them. Walsh also testified in a hearing before the Department of Labor and Industries of the State of Washington that he was responsible for the project. An inspector for the Port of Seattle dealt with Walsh and believed that he was the project superintendent. The court concluded that Walsh held himself out as being in charge and was in fact in charge.

Evidence of Walsh's responsibility as to the two locations where he was not held liable stands in contrast to these findings. At the Woodinville School Project between June 26 and July 3, 1983 Walsh was the vice president and signed the contract for removal by Savage Enterprises. But Esther Miller was the estimator and the one responsible for solving problems during the course of the work, and Joe Silva was the foreman. Walsh was not present at the site. At the removal project at 1104 Northeast 47th Street, Seattle, Walsh was president but did not do the estimating and, as found by the district court, "was never on the job site while the work was being performed."

[4] We conclude that there was no clear error in the district court's findings of fact that Walsh was the operator on the

Sea-Tac and Crab Pot projects, and conclude as a matter of law that the district court correctly required "substantial" control in holding Walsh was "the operator" of these removal projects within the meaning of the Act.

4. *Substantive Violations of the Act*

Walsh makes three contentions. First, that to constitute an "air pollutant" to which emission standards of the Act apply there must exist some "substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). By the ambient air Walsh contends is meant air not within a building but the unenclosed air outside. He cites *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990), which speaks of the emission of pollutants "into the atmosphere." He adds that there was no showing that the emissions here entered the atmosphere, and he draws an analogy with our treatment of state regulations in *Idaho Dep't of Health and Welfare v. United States Dep't of Energy*, 959 F.2d 149, 151 (9th Cir. 1992).

Second, he contends that what is prohibited under the Act is action that would "modify" a "stationary source." 42 U.S.C. § 7412(c)(1)(A). A stationary source under the Act is "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). A modification of a stationary source is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Savage Enterprises stripped asbestos-containing material at Sea-Tac and the Crab Pot within what is described as a "negative area enclosure." A negative area enclosure is a containment area in which the air is filtered by a high efficiency particulate filter designed to remove very small particles of asbestos from the air. After filtering, the air is exhausted to the inside of the building. The negative pressure or static pressure in the

enclosed area is lower than that of the environment outside the containment barriers. The pressure grading is maintained by moving air from the work area to the environment outside the area via power exhaust equipment at a rate that separates the desired air flow and pressure differential. Walsh contends that when a negative air enclosure is used there is no modification to the existing source which increases the amount of air pollutant emitted by the source.

Third, Walsh notes that Savage Enterprises was required by the regulation to "adequately wet friable asbestos materials" as they were being stripped and after they were stripped "to insure that they remain wet" until they were collected for disposal. 40 C.F.R. § 61.147(c) and (e). Walsh contends that there was no first-hand evidence that the materials removed at Sea-Tac were friable. The particular material removed was not itself any longer available. Walsh points to his own testimony that some of the material removed at Sea-Tac was cementitious or, in other words, had the properties of cement and would not have readily crumbled. He also contends there was insufficient evidence that the material that was friable was not adequately wet and that there could not have been such proof without evidence of either dust emissions or visible emissions. He points to 40 C.F.R. § 61.141 which defines as "adequately wet" asbestos that is "sufficiently mixed or coated with water or an aqueous solution to prevent dust emissions." He questions the commonsense conclusions of the inspector who found that on rubbing the material with her hands it crumbled and so in her estimation was friable.

None of Walsh's arguments as to the substantive violations of the Act are without force. Nonetheless, none of them in the end are persuasive. We consider them in turn with this preamble: Congress has provided that judicial review of the standards set by the EPA must be sought only in the United States Court of Appeals for the District of Columbia within 60 days of the notice of promulgation of the standards. 42 U.S.C. § 7607(b). Walsh challenges this limitation on judicial review,

noting that he himself was not even in the asbestos removal business at the time the regulations were promulgated. We take judicial notice, however, that there were many asbestos removal companies in operation at the time of the promulgation of the regulations and that they had motive and opportunity to challenge the regulations if they were unreasonable. There is nothing to prevent Congress from providing a single national forum for the litigation of such standards. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978). We turn to Walsh's specific arguments.

[5] First, the purpose of the work practice standards for demolition and renovation involving asbestos is "to prevent emissions of particulate asbestos material to the outside area," 40 C.F.R. § 61.147, as Walsh himself contends. The agency charged with enforcing the statute may take steps to prevent asbestos emissions reaching the outside area. To achieve this purpose, the EPA instituted the work practice rules. The regulations were challengeable under the procedures and limits set out in 42 U.S.C. § 7607(b)(1). It is too late for Walsh to challenge them in this enforcement proceeding. *Id.* § 7607(b)(2); *see United States v. Ethyl Corp.*, 761 F.2d 1153, 1155 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986). Walsh's attempt to sidestep the work practice rules by his argument that emissions must reach the outside area fails to disturb the validity of the regulations that he is found to have violated. He is liable for a dry removal without an EPA waiver and for failing to keep asbestos material wet. The question of emission of an air pollutant to the ambient air is not relevant. The violation of the work practice rule violates the statute.

[6] Second, "modification" of a source is but one of two bases of liability under 42 U.S.C. § 7412(c)(1). Walsh might be charged with either "modifying" a source, 42 U.S.C. § 7412(c)(1)(A), or with emitting an air pollutant, 42 U.S.C. § 7412(c)(1)(B). The district court ruled that Walsh's violation of work practice standards constituted an emission under 42 U.S.C. § 7412(c)(1)(B), and did not discuss liability based

on a "modification" under 42 U.S.C. § 7412(c)(1)(A). Thus, Walsh's argument that there was no modification when he used a negative air enclosure is irrelevant to his liability for emitting an air pollutant.

[7] Independent of its irrelevance, Walsh's argument fails based on the facts of this case. The negative air enclosure did not prevent a modification of the structure at Sea-Tac when there was physical removal of asbestos from the structure. According to testimony at the trial the system in place was inadequate to keep asbestos emissions within the containment area. Inspector Armina Nolan, whose testimony the district court found to be very credible, observed dry asbestos outside the containment area and observed asbestos being tracked through outside hallways. Carolyn Rankin, an engineer employed by the airport, encountered asbestos outside the containment area. Kent Slater, a foreman with Savage Enterprises, testified that the negative enclosure area was inadequate and did not function properly. Sufficient evidence showed that the negative enclosure did not succeed in preventing emissions from the modification of the structure by the removal of the asbestos.

[8] Third, five witnesses testified that the asbestos removed from Sea-Tac was friable: Inspector Nolan, Inspector Rankin, Inspector Davis, and the two Savage Enterprises employees, Slater and Pham. The district court was in a position to determine whether he would believe this testimony or the counter-testimony of Walsh, whom he generally found credible. We are not in a position to second-guess the finding of the district court that the material was friable and not adequately wetted. Again, as to the Crab Pot, inspectors Nolan and Davis testified to friable material found on the site. The district court's conclusion based on this testimony is not clearly erroneous.

Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX B

CONSISTS OF THE FOLLOWING

54 PAGES (FRONT/BACK)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, PLAINTIFF,	)	Civil Action No. C89-1263Z
v.	)	COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
JAMES A. WALSH, DEFENDANT.	)	

Announced On November 20, 1991.

Entered On November 26, 1991.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW on November 20, 1991, by the Honorable Thomas S. Zilly, United States District Judge, at the United States Courthouse, Seattle, Washington.

THE COURT: Please be seated, ladies and gentlemen. Let me start by thanking the lawyers for the excellent briefs that have been presented prior to trial and the thoughtful proposed Findings of Fact which were presented by both sides, as well as

the presentation during the course of the trial. The Court has benefited from both the written materials that have been submitted as well as what has been presented here during the course of the trial.

I must say at the beginning that I have been concerned about the nature of the case in the sense that the government has brought its full force, three lawyers participating in the trial, we're in our fifth day of trial, originally seeking over $825,000 from a defendant who has essentially no assets. And I have to tell you that I've been concerned as we've gone through this trial with the appropriateness of proceeding under all of those circumstances against this particular defendant.

I do recognize, as I think all the participants and the people who have ob-

served the case recognize, there are important issues of law, important principles that need to be established. And this Court is here to hear those issues in the appropriate case and to decide those issues, and I intend to do so.

This memorandum opinion that I am rendering will be intended to be my opinion. My Findings of Fact and Conclusions of Law pursuant to Rule 52 will be incorporated into my opinion today. I will not be issuing separate or additional Findings of Fact or Conclusions of Law.

This matter comes before the Court after trial. The EPA seeks civil penalties and injunctive relief against the defendant, Mr. James A. Walsh, for violation of the Clean Air Act and its regulations arising from work performed by Savage Enterprises on four jobs during the period

1986 and 1987.

Savage Enterprises, Inc., a Washington corporation, as well as Mr. James Savage have both settled with the EPA and the lone remaining defendant in this case is Mr. Walsh.

I incorporate by reference all of the admitted facts contained in the Pretrial Order and they will be facts found for purposes of my opinion.

The real question presented here is whether Mr. Walsh's activities make him liable for the alleged violations and, of course, were there sufficient violations to subject Mr. Walsh to liability. The regulations impose liability on an owner or operator. These regulations define owner or operator as, "any person who owns, leases, operates, controls or supervises a stationary source," 40 CFR 61.02.

Each of the four locations in question, in my opinion, constituted a stationary source.

I have already ruled that even if Mr. Walsh were not an owner, and nobody contends that he was an owner, he could be responsible if he was an operator if he supervised or controlled the work. I also stated in May of this year as a result of motions for summary judgment that because the statute and the regulations in question impose strict liability, the Court would be reluctant to impose liability unless it was clear that Mr. Walsh was substantially in control or substantially supervised the various projects in question.

I recognize the government contends that there is nothing that has to be substantial about the supervision, but I believe that what was intended here was a

person having significant or substantial or real control and supervision over a project before he or she could be found liable under these regulations if they were not an owner. And it is my intention to apply that test in determining the liability of this defendant.

Although Mr. Walsh's job titles, he was vice-president for a period of time, he was president beginning, I believe, in about March of 1987 through about November of 1987, although those titles and his signing of various documents is some indication of his responsibilities and authority, I believe a job by job analysis is necessary before a decision can be reached.

I must say before reviewing those four jobs in question that I found on the whole Mr. Walsh's testimony to be very

credible. I also found in contrast Mr. Savage's testimony to be not credible. It differed substantially from his prior deposition testimony. And its lack of specificity brings this Court to conclude that little, if any, reliance can be placed on Mr. Savage's testimony during the course of the trial.

I also would like to note the problem in dealing with a small business of ten to 15 people. Savage Enterprises had approximately ten to 15 employees. That included the owner, Mr. Savage, and the other people who served in some management capacity. These small companies don't organize like large companies, and the lines of authority and who is responsible and who is not responsible is much more difficult in a small operation.

I would also point out, of course, on

the other hand, the EPA is seeking to impose penalties, and each employee seeks to point to the other employee and say they're responsible. It's kind of like a shell game. The peanut is under one of the shells and everybody is pointing at the other shell and saying they are not responsible.

Mr. Savage was the owner of the business and obviously was responsible. The question is whether Mr. Walsh is also responsible. Mr. Walsh was an estimator during his employment period with the company. Between May of '86 and February of '87, he served as vice-president, and from March of '87 to November of '87, he served as president. Mr. Savage always continued to be the ultimate person in control as evidenced by the fact that he fired Mr. Walsh at one point in the summer of 1988

and Mr. Walsh terminated his employment with the company. As is the case with many small companies, the title given to the person is not necessarily indicative of a person's authority or lack of authority.

Let's turn now to the four projects in question. The first project I want to discuss is the Sea-Tac project. It involved work at the Port of Seattle during the period approximately January 4, 1986, through April 15, 1986. Both Mr. Savage and Mr. Walsh estimated the job. Mr. Walsh wrote the letter proposal of January 4, 1986, which is exhibit 6, to the Elan Construction Company, the general contractor for renovation work at Sea-Tac.

Mr. Walsh's letter indicated that dry removal may be used around the perimeter walls of the work. There is a dispute as

to how much of the perimeter would be subject or possibly subject to dry removal. Mr. Walsh has testified that he intended it to be 12 inches, but then he also intended not to use dry removal. I would point out that the letter also states that the work would be done in strict compliance with all governmental rules and regulations. Mr. Walsh also signed the Notice of Intent to Remove, exhibit 4, and the Amended Notices, exhibit 5.

Between January 20 and April 15th, the Savage Enterprise employees conducted removal of asbestos from the Sea-Tac Airport project. During the project, Kent Slater, the foreman, testified he discussed the work with Mr. Walsh, took directions from him and Mr. Walsh directed dry removal of asbestos around the perimeter of the work area. I find that testimony

to be credible and make that finding. Mr. Slater also testified and I find that dry, friable material capable of crumbling with hand pressure was removed from the Sea-Tac project.

Mrs. Nolan of the Puget Sound air control authority, whose testimony I also found to be very credible, met with Mr. Walsh at the site about February 4, 1986, and discussed various problems. Mr. Walsh suggested various solutions and alternatives. Mrs. Nolan went back on February 11th and prepared an inspection report, exhibit 72, which outlines the violations including the removal of dry, friable asbestos, asbestos not adequately wetted and a large pile of asbestos inside the containment area.

Three notices of violation were issued on February 11th, exhibits 65, 66 and

67, and they were sent to Jim Savage as the person responsible, the owner or the agent of the owner. Samples were taken and tested positive for asbestos as contained in exhibit 64. Subsequent notices and orders of civil penalties were sent to the Savage company, exhibits 68 and 69. Mr. Walsh signed the Notice of Appeal, exhibit 7, appealing these notices. A portion of the penalty was later affirmed, I believe in the amount of $500.

Ms. Carolyn Rankin, a Port inspector, also inspected the project, dealt with Mr. Walsh and testified that friable material was present at the jobsite in violation of the various regulations. Mr. Walsh was the primary contact with Ms. Rankin on several occasions. I found her testimony to be very credible and supported by her inspection reports as well as her diary

notations.

I find and conclude under all the facts that were presented in connection with this particular project that Mr. Walsh, although he only had the title of estimator at the time, was, in fact, the Savage Enterprises employee responsible for the overall supervision and control of that project. He had the ability to correct work, he was the person having the necessary control to be an operator under the statute. I also find there were serious violations of work practices under 40 CFR 147 which will support liability against Mr. Walsh arising from the Sea-Tac project.

The next project I want to discuss is the Woodinville School project. Between June 26th and July 3 of 1986, Savage Enterprises conducted removal of asbestos at

the Woodinville School located at 13209 Northeast 175th Street in Woodinville, Washington. During this period, Mr. Walsh was the vice-president and he signed the contract for Savage Enterprises. Esther Miller was, however, the estimator and responsible for solving problems during the course of the work. Mr. Joe Silva was the foreman of the project.

Mr. Walsh was not present at the work and I find did not have sufficient control over this project to be an operator of the project. Although serious violations were found to exist, he cannot be held personally responsible because of his lack of hands-on supervision and control of that project. The fact that Mr. Walsh may have signed a Notice of Appeal and a Notice of Violation is, in my opinion, not sufficient to bring into account civil liabili-

ty against the defendant for this project.

The third project that I want to discuss is the Crab Pot Restaurant. Between July 17 and September of 1986, Savage Enterprises conducted removal of asbestos at the Crab Pot Restaurant facility at Pier 52 in Seattle. During this project, Mr. Walsh was vice-president of Savage Enterprises and responsible for the overall supervision of the project, including all contractual aspects. He signed the Notice of Intent to Remove, exhibit 10.

Mr. Van Pham visited the worksite before work commenced and talked to Mr. Walsh about the scope of the project. Van Pham was the foreman during the first week and he took directions from Mr. Walsh. Mr. Walsh testified and I find that there were, in fact, two shifts that were working on this project, a day shift and a

night shift, and two separate foremen. If there were problems or calls by the workers or the other inspectors, Mr. Walsh admits he would have dealt with them.

Mr. Walsh testified previously on July 22nd of 1987 before the Department of Labor and Industries in a hearing, his testimony is reflected in exhibit 186, that he was responsible for this project. Mrs. Nolan inspected the project in July, exhibit 103, and September 8th, 11th and 22nd, exhibit 104, and found asbestos material in a crawl space as well as chunks of asbestos in the floor where the work had been done. Samples were taken which revealed asbestos as shown by exhibits 106, 107 and 108.

Judy Tallman, I believe her name was Judy Stevens at the time, was the inspector for the Port of Seattle during this

project and believed Mr. Walsh was the project superintendent. Mrs. Tallman dealt with the defendant regarding scheduling, delays and increased costs in the project. She talked to the defendant two to three times a week during the entire course of the project.

Mr. McClelland Davis of the Department of Labor and Industries inspected the Crab Pot in July and August, see exhibit 109, and found asbestos outside the containment area, found workers without proper equipment and testified and I find the asbestos was friable.

Mr. Savage testified during his deposition, page 131, line 14, that Mr. Walsh was the superintendent and had an on-site supervisory role for the Crab Pot Restaurant. I find and conclude that Mr. Walsh did have, in fact, overall supervision of

this project and/or held himself out to others as being a person in charge. I find violations of the work practices and find that Mr. Walsh is responsible for them. I also find that the violations here were not as significant as they were at the Sea-Tac project.

The fourth and last project is 1104 Northeast 47th Street here in Seattle. Actually, this project involved removal of asbestos from two buildings owned by the Coppage family located at the corner of 11th Avenue and 47th Northeast in Seattle. The larger of the two buildings was a two-story building commonly referred to as the 1104 Building.

Although Mr. Walsh was the president of the company at that time, he had no real personal involvement in this particular project. He signed the Notice of Re-

moval for the small cottage which adjoined the 1104 Building, the small cottage's notice was, I believe, exhibit 118, but did not estimate the 1104 project. That was done by Mr. Pullen, I believe. But in any event, it wasn't done by this defendant. And there was no notice sent by anyone as required by law as to this project.

I find and conclude based on the evidence that Mr. Walsh was not an operator as it relates to the 1104 Building site for purposes of this case. I make that conclusion because he didn't estimate the job, he was never on the jobsite while the work was being performed. He never actually saw the building and testified that he never did know what it looked like until he saw pictures during the course of the trial. And there may have been other people that would be responsible and could

be brought to account, but I don't believe Mr. Walsh is one of them. The fact that he was president in name does not, in my opinion, suffice. And his personal involvement, as I've indicated, is not sufficient, I believe, to find liability.

I believe and find that it is not necessary to find specific air emissions in order to have a violation under the Clean Air Act. But I also find in the alternative that evidence was presented that under specific conditions observed and documented at both the Sea-Tac and Crab Pot projects, the government has proved by a preponderance of evidence that the defendant caused asbestos materials to be emitted to the outside air during the removal or after removal in violation of 42 USC Section 7412.

The next subject that needs to be

dealt with is Mr. Walsh's financial condition and what is an appropriate civil penalty. I have a lot of concern here because of the nature of the defendant's financial condition at the present time. It is true that while he worked at Savage Enterprises, as shown by various exhibits and his own testimony, he made during the first year approximately 26 to $28,000, during the second year $35,000, during the third year, I believe the total was 110,000 as shown by his income tax returns, although 50,000 of that was a loan and then later converted into compensation at the direction of Mr. Savage, and during the fourth year, 18 to $20,000.

Unfortunately, Mr. Walsh has fallen on somewhat hard times. During 1990, he had attributable income to him of $8900, most of which was attributable income

other than real income paid to him for his work. I think the level of his income, actual earnings themselves, was something in the two to $3,000 range. Maybe it was as much as 4,000. It wasn't enough to live on. And clearly, he's not been able to live on what he's made and as a result has lived with his girlfriend, apparently, who pays the rent and buys the food. Sounds like a pretty good deal for Mr. Walsh, but it obviously indicates that he is not able to pay any significant fine or civil penalty as well.

The expert that the government presented, an EPA expert economist, frankly admitted under questions from the Court that given his level of actual income or even attributable income during 1990 and 1991, the defendant cannot pay any significant fine or civil penalty.

Based on the facts that I've found, I make the following Conclusions of Law.

One. The Court has jurisdiction over the subject matter pursuant to Section 113 (b) of the Clean Air Act, 28 USC Section 7413(b). Also, venue is proper in this district pursuant to 28 USC Section 7413 (b).

Two. Section 112 of the Clean Air Act, 42 USC Section 7412, authorizes the administrator of the Environmental Protection Agency to publish a list of hazardous air pollutants and to establish a national emission standard for hazardous air pollutants, frequently known as NESHAP, to provide an ample margin of safety to protect the public health from such hazardous air pollutants. 42 USC Section 7412(b)(1)(B).

A hazardous air pollutant is an air pollutant which, in the judgment of the

administrator, causes or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious, irreversible or incapacitating irreversible illness. 42 USC Section 7412(a)(1).

Asbestos is listed as a hazardous air pollutant. 36 Federal Register 3031.

It is not feasible to prescribe or enforce an emission standard for control of a particular hazardous pollutant. The administrator of the EPA may instead promulgate a design, equipment or work practice, operational standard or combination thereof.

The asbestos NESHAP establishes work practices to be followed in the handling of asbestos and any work practice standard promulgated as a part of NESHAP should be treated as an emission standard. A viola-

tion of NESHAP is a violation of the Clean Air Act. 42 USC Section 112(c)(B)(1)(b) and 112(e).

A person is liable for civil penalties under the act if the United States can demonstrate that minimum threshold requirements of the asbestos NESHAP have been met and that the work practices of the asbestos NESHAP have not been satisfied. As I've indicated, a person violates those practices when a person is the owner or operator of a renovation or demolition operation, a threshold amount of friable asbestos was involved and the person violated the guidelines.

The asbestos NESHAP applies to each owner or operator of a demolition or renovation operation if the amount of friable material reaches a certain amount. I find that the amount of friable material reach-

ed the required amount, and I find that Mr. Walsh is an operator under the meaning of the Clean Air Act and its regulations. Visible emissions to the outside air from a facility need not be shown for an owner or operator to violate the asbestos work practices NESHAP.

As I've indicated, an owner or operator who violates asbestos work practices is liable for civil penalties up to $25,000. I have previously found as a fact and I find as a conclusion of law as well that Mr. Walsh was an owner/operator under the Clean Air Act and its applicable regulations, has violated the asbestos NESHAP work practices, regulations.

In determining the amount of penalty, I must consider the nature of the violations, the size of the business that was in existence at the time and the present

business, the ability to pay. And the amount of penalty is always at the discretion of the Court. The Court must take into account the good or bad faith of the defendant and the need to deter others.

I wish to state on the record that I do take into account what I felt to be very credible and responsive testimony while Mr. Walsh testified. And he did acknowledge, I'm satisfied, the seriousness of the charges and the need to abide by all of these regulations which he's been called upon to answer to. I also find that during his course of work at Savage, he took efforts to train himself and to train others and to prepare work manuals that dealt with the problems dealing with asbestos.

I am also taking into account the nature of the fact that there is no reported

opinion that anyone can point to that has held a nonowner responsible for civil penalties.

In the Court's judgment, taking all of this into account, the EPA should be awarded a civil penalty against Mr. Walsh as follows. In connection with the Sea-Tac project, a civil penalty in the amount of $2500. And with respect to the Crab Pot project, a civil penalty in the amount of $1,000. The penalties must be paid within two years of the date of judgment, with interest accruing at the federal rate of interest.

I am also going to award and grant injunctive relief against Mr. Walsh personally. I believe it is appropriate that injunctive relief be granted in a case like this given the nature of the violations that have occurred. Mr. Walsh will

be enjoined from engaging in any removal of asbestos without full and complete compliance with the Clean Air Act and the asbestos NESHAP work practices. The period of the injunctive relief should be for a period likewise of two years.

I would point out that in assessing a penalty, as I have said, I have taken into account a lot of factors. I suppose primarily I'm taking into account that the owner of this business is not here for me to assess penalties against, and Mr. Walsh has little ability to pay a penalty. I am hopeful that the Court's decision and the findings of the Court will be a substantial deterrent to others. I am confident that it is going to be a deterrent to Mr. Walsh as he continues to work in this industry.

I think that assessing a greater pen-

alty would be not productive, would not be collectable and would serve no reasonable or just purpose. I believe that the penalties in the amounts that I've indicated are something that, hopefully, Mr. Walsh will be able to pay in the period I've indicated and get on with his life.

I believe that concludes my findings and conclusions and we'll be at recess. Thank you very much.

(At 11:53, court was in recess.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, PLAINTIFF,	)	Civil Action No. C89-1263Z
v.	)	ORDER FOR INJUNCTIVE RELIEF
JAMES A. WALSH, DEFENDANT.	)	

Entered On January 6, 1992.

ORDER FOR INJUNCTIVE RELIEF

Upon consideration of the arguments of counsel and the evidence elicited during the trial of this matter from November 14 through November 20, 1991, it is hereby ORDERED, ADJUDGED, AND ADJUDICATED as follows:

1. Defendant James A. Walsh is enjoined from violating all applicable provisions of the Clean Air Act and the asbestos NESHAP in all renovation or demolition operations involving the stripping or

removal of asbestos including the provisions set forth in 40 C.F.R. §61.146 and §61.147.

2. Whenever defendant Walsh conducts, substantially supervises, or substantially controls a renovation or demolition operation which is subject to the asbestos NESHAP, Defendant Walsh shall provide EPA Region 10 with a copy of any notice required to be provided to any state or local pollution control agency as set forth in 40 C.F.R. § 61.146. Notice to EPA shall be sent to:

Asbestos Program Manager
Air and Toxics Division, AT-082
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

3. This injunction shall remain in effect for a two year period commencing on November 20, 1991.

DATED THIS 6th DAY OF January,

1991 [sic].

/S/

THOMAS S. ZILLY
United States District
Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, PLAINTIFF,	Civil Action No. C89-1263Z
v.	JOINT PROPOSED PRE-TRIAL ORDER
JAMES A. WALSH, DEFENDANT.	[ADMITTED FACTS PORTION ONLY]

Filed With Court On October 29, 1991.

Entered on Docket October 30, 1991.

1. Defendant Walsh is a resident of King County, Washington.

2. Savage Enterprises, Inc. ("Savage Enterprises") was incorporated on March 26, 1984.

3. During the period from March 26, 1984 through July 27, 1988, Savage Enterprises provided services as an asbestos abatement and paint contractor.

4. On or about July 27, 1988, Savage Enterprises ceased operations and was

thereafter dissolved as a corporate entity by the State of Washington.

5. During its life as a painting and asbestos removal contractor, Savage Enterprises contracted to perform over 500 asbestos removal or encapsulation projects.

6. During its life as a contractor, Savage Enterprises averaged not more than 10-15 full time employees.

7. Defendant Walsh was first employed by Savage Enterprises by no later than March 1985.

8. From at least May 1986 through February 1987, defendant Walsh was vice-president of Savage Enterprises.

9. As vice-president, Mr. Walsh supervised daily operations, financial analysis, sales projections, prepared cost estimates and notices of intent to remove

asbestos ("NIRAs"), quality control, public relations, customer liaison, and contract management.

10. From March 1987 through November 26, 1987, Defendant Walsh served as president of Savage Enterprises. As president, Mr. Walsh's tasks and functions included the same tasks and functions he had performed as vice-president.

11. On November 26, 1987, Defendant Walsh resigned as president of Savage Enterprises.

12. After Mr. Walsh resigned as president and until at least June 16, 1988, defendant Walsh continued to refer to himself in certain contract and other documents as president of Savage Enterprises.

13. After defendant Walsh resigned as president, Mr. Walsh's tasks and functions continued to include the same tasks

and functions he had previously performed as vice-president.

14. From March 31, 1987 through July 15, 1988, Mr. Walsh served on the Board of Directors of Savage Enterprises.

15. At no time did Walsh have any ownership interest in Savage Enterprises.

16. After any notice of violation was issued, Walsh's personal involvement as vice president and as president included complaint investigation and implementing remedial measures.

17. Defendant Walsh was the primary, but not the only, official at Savage Enterprises who represented the company before administrative agencies with respect to environmental compliance matters.

18. During defendant Walsh's employment at Savage Enterprises, his responsibilities included the hiring or firing of

union and other workers at Savage Enterprises. Walsh was only one of several Savage Enterprises employees who could (but not necessarily did) hire and terminate union and other workers.

The Sites at Issue

Rainier Bank

19. Savage Enterprises engaged in a renovation operation within the definition of the NESHAP regulations, 40 C.F.R. § 61.141, in the soffit areas at the Rainier National Bank facility, located at 1620 California Street in Everett, Washington.

20. The renovation operation on the soffit areas at the Rainier Bank involved the removal or stripping of friable asbestos material as defined in 40 C.F.R. § 61.141.

21. The Rainier Bank was a stationary source within the definition of 40

C.F.R. § 61.02.

22. The Rainier Bank was a facility within the definition of 40 C.F.R. § 61.141.

23. The renovation operation on the soffit areas at the Rainier Bank facility involved the removal or stripping of quantities of friable asbestos in excess of 260 linear feet on pipes or 160 square feet on other facility components.

24. Savage Enterprises was an operator on the soffit areas at the Rainier Bank, within the definition of 40 C.F.R. §§ 61.02 and 61.141, during the renovation operation at the facility.

Sea-Tac Airport

25. Savage Enterprises engaged in a renovation operation within the definition of the NESHAP regulations, 40 C.F.R. § 61.141, at the Sea-Tac Airport facility in

the State of Washington.

26. The renovation operation at the Sea-Tac Airport involved the removal or stripping of asbestos material.

27. The defendant contends that the removal or stripping involved non-friable asbestos materials. The United States contends that the removal or stripping involved friable asbestos material.

28. The Sea-Tac Airport was a stationary source within the definition of 40 C.F.R. § 61.02.

29. The Sea-Tac Airport was a facility within the definition of 40 C.F.R. § 61.141.

30. The renovation operation at the Sea-Tac Airport facility involved the removal or stripping of quantities of asbestos in excess of 260 linear feet on pipes or 160 square feet on other facility com-

ponents.

31. Savage Enterprises was an operator at the Sea-Tac Airport, within the definition of 40 C.F.R. §§ 61.02 and 61.141, during the renovation operation at the facility.

32. Defendant Walsh was responsible for supervising the contractual aspects of the relationship between Sea-Tac Airport and Savage Enterprises.

33. On October 3, 1986, Walsh testified under oath at a hearing held by the Washington State Pollution Control Hearing Board regarding Savage Enterprises' appeal of PSAPCA notices of violation dated February 11, 1986 and February 14, 1986 relating to the Sea-Tac Airport project that the asbestos material removed was not particularly friable, that it was cementitious, that it was harder than sheetrock

but softer than concrete, and that he had soaked a piece of it in water overnight and that when he broke it open with a hammer the following morning it was still dry inside.

Woodinville School

34. Savage Enterprises engaged in a renovation operation within the definition of the NESHAP regulations, 40 C.F.R. § 61.141, at the Woodinville School facility at 13209 N.E. 175th Street in Woodinville, Washington.

35. The renovation operation at the Woodinville School involved the removal or stripping of friable asbestos material as defined in 40 C.F.R. § 61.141.

36. The Woodinville School was a stationary source within the definition of 40 C.F.R. § 61.02.

37. The Woodinville School was a fa-

cility within the definition of 40 C.F.R. § 61.141.

38. The renovation operation at the Woodinville School facility involved the removal or stripping of quantities of friable asbestos in excess of 260 linear feet on pipes or 160 square feet on other facility components.

39. Savage Enterprises was an operator at the Woodinville School, within the definition of 40 C.F.R. §§ 61.02 and 61.141, during the renovation operation at the facility.

40. Defendant Walsh was vice-president of Savage Enterprises during the Woodinville School project.[3]

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[3] In his response to the United States' Request for Admissions, this statement originally contained two clauses. Specifically, it read as follows: "Defendant Walsh was vice president of Savage Enterprises during the Woodinville School project and signed the project contract on behalf of the company." Subject to Rule 36(b), Plaintiff United States does not object to dropping the second clause of this admission.

Crabpot Restaurant

41. Savage Enterprises engaged in a renovation operation within the definition of the NESHAP regulations, 40 C.F.R. § 61.141, at the Crabpot Restaurant facility located at Pier 52 in Seattle, Washington.

42. The renovation operation at the Crabpot Restaurant involved the removal or stripping of friable asbestos material as defined in 40 C.F.R. § 61.141.

43. The Crabpot Restaurant was a stationary source within the definition of 40 C.F.R. § 61.02.

44. The Crabpot Restaurant was a facility within the definition of 40 C.F.R. § 61.141.

45. The renovation operation at the Crabpot Restaurant facility involved the removal or stripping of quantities of fri-

able asbestos in excess of 260 linear feet on pipes or 160 square feet on other facility components.

46. Savage Enterprises was an operator at the Crabpot Restaurant, within the definition of 40 C.F.R. §§ 61.02 and 61.141, during the renovation operation at the facility.

47. Defendant Walsh was vice-president of Savage Enterprises during the Crabpot Restaurant project and was responsible for the supervision of the contractual aspects of the relationship between the Washington State Department of Transportation (owner of the Crabpot Restaurant facility) and Savage Enterprises.

1104 Building

48. The operation at the 1104 Building involved the removal or stripping of friable asbestos material as defined in 40

C.F.R. § 61.141.

49. The 1104 Building was a stationary source within the definition of 40 C.F.R. § 61.02.

50. The operation at the 1104 Building involved the removal or stripping of quantities of friable asbestos in excess of 260 linear feet on pipes or 160 square feet on other facility components.

51. Savage Enterprises conducted an operation at the 1104 Building.

52. Defendant Walsh was president of Savage Enterprises during the 1104 Building project and signed the project contract of [sic] behalf of the company.

53. Defendant Walsh was in Seattle on March 23, 1987, during the asbestos removal phase of the 1104 Building project.

54. At the 1104 Building, Savage Enterprises failed to provide written notice

of intent to remove asbestos to PSAPCA prior to asbestos removal.

55. The 1104 Building was a two-story structure that had (a) four apartment units on the second floor and (b) an office and restaurant on the first floor.

56. The 1104 Building was severely damaged by a gas explosion that occurred before Savage Enterprises undertook its asbestos removal project at the premises.

57. Demolition of the 1104 Building was scheduled to start on April 4, 1987; the building subsequently was demolished.

Terry Avenue

58. Savage Enterprises engaged in a renovation operation within the definition of the NESHAP regulations, 40 C.F.R. § 61.141, at 2121 Terry Avenue ("Terry Building") in Seattle, Washington.

59. The renovation operation at the

Terry Building involved the removal or stripping of friable asbestos material as defined in 40 C.F.R. § 61.141.

60. Terry Building was a stationary source within the definition of 40 C.F.R. § 61.02.

61. Terry Building was a facility within the definition of 40 C.F.R. § 61.141.

62. The renovation operation at the Terry Building involved the removal or stripping of quantities of friable asbestos in excess of 260 linear feet on pipes or 160 square feet on other facility components.

63. Savage Enterprises was an operator at the Terry Building, within the definition of 40 C.F.R. §§ 61.02, 61.141, during the renovation operation at the facility.

64. Defendant Walsh was vice-president of Savage Enterprises during the Terry Building project.

65. Walsh, individually or otherwise, has at no time had an ownership or leasehold interest in any of the above buildings or projects.

66. To become and continue to be a state-certified asbestos worker, an individual is required to periodically attend state sponsored courses and pass tests relating to the identification of asbestos, proper asbestos removal techniques, personal health protection, air monitoring, and other relevant topics.

67. In 1985, Savage Enterprises prepared and published a document entitled "Technical Specifications - Asbestos Abatement" (the "Asbestos Abatement Manual").

68. In 1985, Savage Enterprises prepared and published a safety manual entitled "Savage Enterprises, Inc., Employee Safety Handbook" (the "Safety Manual"). A portion of the Safety Manual was devoted to handling asbestos materials, negative air enclosures, and glove bag enclosures.

69. Savage Enterprises employees who signed checks included James J. Savage, Sandra L. Sprague, Dixie Housen, Barbara A. Griffith, Lori L. Gleich, and James A. Walsh.

70. The United States has no samples of the asbestos-containing material that was in fact removed or stripped by Savage Enterprises from either the Rainier Bank or the Sea-Tac Airport.

STATE OF WASHINGTON)
: ss AFFIDAVIT
COUNTY OF KING)

RHYS A. STERLING, being first duly sworn on oath, states:

1. I am the attorney of record for Petitioner James A. Walsh in this matter.

2. I am a member of the bar of this Court (admitted December 6, 1993).

3. The preceding materials set forth in Appendix B of this Petition For Writ Of Certiorari are, to the best of my own knowledge and ability, a true and accurate reproduction of the purported documents on file with the United States District Court, W.D. Washington, at Seattle.

DATED this 1st day of February, 1994.

RHYS A. STERLING

Subscribed and sworn to before me on this 1st day of February, 1994.

W Theodore Vanderveld

W Theodore Vanderveld

(Print Name)

Notary Public in and for the State of Washington residing at Lynnwood.

My commission expires 12-19-96.

(2)

No. 93-1316

Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES A. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), which precludes challenges to agency regulations in an enforcement action, deprives the petitioner of due process in contravention of the Fifth Amendment.

2. Whether in order to show a violation of the work practice standards of the Clean Air Act, 42 U.S.C. 7412(e), the government must prove an emission of an air pollutant to the outside air.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1316

JAMES A. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A12065-A12075) is reported at 8 F.3d 659. The opinion of the district court (Pet. App. B1-B30) is reported at 783 F. Supp. 546.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1993. The petition for a writ of certiorari was filed on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was found liable for two violations of Section 112 of the Clean Air Act (CAA), 42 U.S.C. 7412 (as in effect prior to the CAA's November 15, 1990 amendment[1]), and the National Emission Standards for Hazardous Air Pollutants for asbestos, 40 C.F.R. Pt. 61, Subt. M (NESHAP) (as in effect prior to the regulation's November 20, 1990 amendment[2]). He was assessed $3,500 in civil penalties. Pet. App. A12067-A12069.

1. Congress enacted the CAA to protect and enhance the quality of the Nation's air resources. 42 U.S.C. 7401(b)(1). Section 112 of the CAA authorizes the Administrator of the Environmental Protection Agency (EPA) to publish a list of hazardous air pollutants that "cause[], or contribute[] to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. 7412(a)(1) and (b).

Section 112(b)(1)(B) directs the Administrator to prescribe what are known as National Emission Standards for Hazardous Air Pollutants (NESHAPs), which must be set at a level that provides an ample margin of safety to protect the public health from such hazardous air pollutants. 42 U.S.C. 7412(b)(1)(B). When it is not feasible to prescribe or enforce emission standards, the Administrator may promulgate work practice standards prescribing specific

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[1] See Pub. L. No. 101-549, 104 Stat. 2399.

[2] Our citations to the asbestos NESHAP refer to the version set out at 40 C.F.R. Pts. 61-80 (1989).

procedures for handling hazardous air pollutants. 42 U.S.C. 7412(e).

Section 112(c) of the Clean Air Act prohibits construction of a new source or modification of an existing source, such that the source will emit an air pollutant in violation of an emission standard, and it also prohibits the emission of any air pollutant from any stationary source in violation of an emission standard. 42 U.S.C. 7412(c)(1)(A)-(B). Section 112(e)(5) specifically provides that work practice standards are to be treated as emission standards. 42 U.S.C. 7412(e)(5).

Section 113 of the Act, 42 U.S.C. 7413, authorizes EPA to institute an action for civil penalties and injunctive relief for violation of Section 112(c). Under Section 113, a person is liable for up to $25,000 per day for each violation. The courts have imposed strict civil liability for work practice violations of the Act. See, *e.g.*, *United States* v. *Sealtite Corp.*, 739 F. Supp. 464, 468 (E.D. Ark. 1990); *United States* v. *Hugo Key & Son, Inc.*, 731 F. Supp. 1135, 1137 (D.R.I. 1989); *United States* v. *Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1020-1021 (D.N.J. 1988) ("the statute and regulations themselves do not indicate that scienter is required for establishing violations of the Act").

2. In 1971, the Administrator designated asbestos, which has well established harmful effects, as a hazardous air pollutant. 36 Fed. Reg. 5931 (1971). Exposure to asbestos can cause a debilitating lung disease called asbestosis, a rare cancer of the chest and abdominal lining called mesothelioma, and cancers of the lung, esophagus, stomach, colon and other organs. 38 Fed. Reg. 8820 (1973); see *Reserve Mining*

Co. v. *EPA*, 514 F.2d 492, 508 n.26 (8th Cir. 1975) (cataloguing research showing numerous cases of mesothelioma from asbestos exposure of people who merely lived with workers exposed to asbestos).

Significant sources of airborne asbestos include demolition and renovation activities in which insulation containing asbestos is stripped or removed from structures and pipes. The Administrator has issued an asbestos NESHAP that regulates emissions of airborne asbestos by establishing work practice standards for handling asbestos during stripping and removal. 40 C.F.R. 61.146, 61.147, 61.152. The asbestos NESHAP applies to "each owner or operator of a demolition or renovation operation" that strips or removes at least 260 linear feet of asbestos material from pipes or at least 160 square feet of asbestos materials from other facility components. 40 C.F.R. 61.145. An "owner or operator" is defined to include a person who "owns, leases, operates, controls or supervises" a facility that may emit any hazardous air pollutant. 40 C.F.R. 61.02.

The work practice standards at issue in this case require each owner or operator of a renovation or demolition operation in which there is a regulated amount of asbestos to: (1) adequately wet friable asbestos materials when they are being stripped from facility components, unless EPA waives this requirement, 40 C.F.R. 61.147(c); and (2) adequately wet friable asbestos materials that have been removed or stripped and to ensure they remain wet until they are collected for disposal, 40 C.F.R. 61.147(e).

3. Petitioner worked for Savage Enterprises, an asbestos abatement and paint contractor, from March 1985 through July 1988. During that period, petitioner

served at times as both vice-president and president of the 10-15 person company. The company, which was founded in 1984 and dissolved in 1988, performed more than 500 asbestos removal and encapsulation projects during its existence. Pet. App. B35-B36 (Admitted Facts).

On August 22, 1989, the United States filed a complaint seeking both civil penalties and injunctive relief from Savage Enterprises, James Savage, the company owner, and petitioner for violations of the asbestos NESHAP. The complaint alleged that seven different asbestos removal projects performed by Savage had violated the asbestos NESHAP. A consent decree settling the case with James Savage and Savage Enterprises was entered on September 13, 1991. No settlement could be reached with petitioner. Pet. App. A12068.

In November 1991, a five-day bench trial was held in which the United States presented evidence of asbestos NESHAP violations at four asbestos removal jobs that petitioner supervised.[3] At two of those sites, the district court found insufficient evidence of petitioner's involvement to support liability. At two other job sites, Sea-Tac Airport and the Crab Pot Restaurant, the district court found petitioner liable for violations of the asbestos NESHAP. Pet. App. B9-B19.

Specifically, after the testimony of several witnesses, the district court found petitioner liable for conducting a dry removal of asbestos at Sea-Tac

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[3] Although seven asbestos removal projects were originally at issue, the district court dismissed the United States' claims as to one site and, at the request of the district court, the United States limited its proof at trial to four sites.

without following the procedures prescribed for obtaining a waiver of the wetting requirement, 40 C.F.R. 61.147(c), and the court found petitioner liable for failing to ensure that friable asbestos material at that site remained wet until collected for disposal, 40 C.F.R. 61.147(e). Pet. App. B9-B13. At the Crab Pot restaurant site, petitioner similarly failed to ensure that friable asbestos at the site remained wet until collected for disposal. *Id.* at B15-B18.

Petitioner asserted throughout the trial that the United States could not demonstrate a violation of the CAA by merely showing a violation of a work practice rule. Rather, petitioner contended that the United States must show that a pollutant was emitted to the outside air. The district court rejected that contention. The court observed that work practice standards are imposed in those cases where it is not feasible to prescribe or enforce an emission standard for control of a particular hazardous pollutant. The court therefore held that a violation of a work practice standard constitutes a violation of the Act. Pet. App. B20, B24-B26. In the alternative, the district court held that the United States had shown by a preponderance of the evidence that petitioner caused asbestos materials to be emitted to the outside air during removal or after removal in violation of 42 U.S.C. Section 7412. *Id.* at B20.

The district court assessed $3,500 in civil penalties against petitioner and enjoined him from performing further asbestos-removal projects for a two-year period without first notifying EPA. Pet. App. B28-B29, B31-B33 (Injunction).

4. Petitioner raised numerous challenges on appeal, including the argument that there can be no

violation of the CAA without proof of an emission of an air pollutant to the atmosphere. Appellant's C.A. Br. 23-28. The United States responded to that argument on the merits. Gov't C.A. Br. 14-22. The United States also noted that petitioner was effectively challenging the validity of the asbestos NESHAP and that Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), expressly prohibits such challenges in an enforcement proceeding. Gov't C.A. Br. 15-17.[4]

Petitioner replied that he was not challenging the validity of the regulations and that even if he was, the court should permit his challenge because he was not in the asbestos abatement business at the time the regulations were issued and therefore lacked standing to challenge the regulations at that time. Appellant's C.A. Reply Br. 2-3. Petitioner suggested in his reply brief that "serious *constitutional due process* concerns arise if Section [307(b)(2)] in fact operates to bar [petitioner] from raising the legal issues that he now asks this Court to review." Appellant's C.A. Reply Br. 4. Petitioner, however, did not raise the constitutionality of Section 307(b)(2) as one of the 12 issues he presented for review, Appellant's C.A. Br. 1-4, nor did he brief that issue, Appellant's C.A. Reply Br. 4.

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[4] Section 307(b)(2) states:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) [42 U.S.C. 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. 7607(b)(2).

The court of appeals affirmed the district court's judgment and rejected petitioner's various arguments. Pet. App. A12065-A12075. Among its conclusions, the court held that petitioner's challenge to the Asbestos NESHAPS regulations was prohibited by Section 307(b)(2) of the CAA. The court's opinion contains no discussion of whether Section 307(b)(2) violates the Due Process Clause.

ARGUMENT

Petitioner asserts (Pet. 28-45) that Section 307(b)(2) of the CAA, which prohibits challenges to CAA regulations in an enforcement proceeding, violates the Due Process Clause. Petitioner further contends (Pet. 45-50) that EPA's interpretation of the CAA and the Asbestos NESHAPs regulations is erroneous. Petitioner's contentions are not supported by a single court decision and do not warrant review by this Court.

1. Petitioner devotes most of his argument (Pet. 27-45) to an issue that he did not raise in the court of appeals and that the court of appeals did not decide: whether Section 307(b)(2) of the CAA violates the Due Process Clause.[5]

Section 307(b)(2) provides that judicial review of the standards set by EPA must be sought only in the United States Court of Appeals for the District of Columbia within 60 days of the notice of promulgation of the standards. 42 U.S.C. 7607(b)(2). Congress

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[5] Petitioner implicitly concedes that he failed to raise the issue in the court of appeals: He relies on his answer to the United States' complaint for the proposition that the due process issue has been preserved for this Court's review. See Pet. 15-16.

enacted Section 307(b) to foster finality by providing a single forum for determining whether rules are properly promulgated. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284-285 (1978). As petitioner notes (Pet. 30 n.28), similar provisions are found in several environmental statutes.[6]

Petitioner contends that those provisions are all unconstitutional because they do not comport with the requirements of due process. Petitioner can point to no judicial decision supporting that argument. To the contrary, this Court held in *Yakus* v. *United States*, 321 U.S. 414, 433-437 (1944), that Congress could require that the validity of a regulatory action be challenged in a particular court at a particular time or not at all. Similarly in *Adamo Wrecking*, this Court held that while a district court may determine whether the regulation that the defendant is alleged to have violated is an emission standard, the court may not "engage in judicial review in a manner that is precluded by § 307(b)(2) of the Act." 434 U.S. at 285. Both of those cases involved criminal prosecutions.[7]

This Court has recognized that Congress possesses great latitude in determining the jurisdiction of the courts and deciding where and when issues

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[6] See 33 U.S.C. 1369(b)(2) (Federal Water Pollution Control Act); 42 U.S.C. 4915(a) (Noise Control Act); 42 U.S.C. 9613(a) (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. 6976 (Solid Waste Disposal Act).

[7] One Member of the Court in *Adamo Wrecking* stated that if the constitutionality of Section 307(b) of the CAA had been raised "it would have merited serious consideration," 434 U.S. at 289 (Powell, J. concurring). But in this case, as in *Adamo Wrecking*, the issue was not raised below.

shall be adjudicated. See, *e.g.*, *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748 (1974); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331-332 (1966). The lower courts have respected that principle and have routinely held that Section 307(b)(2) and similar provisions foreclose parties from challenging the validity of regulations except through the mechanisms that Congress has provided. See, *e.g.*, *United States* v. *Ethyl Corp.*, 761 F.2d 1153, 1155 (5th Cir. 1985) (Section 307(b) deprived district court of subject matter jurisdiction to a challenge of regulations), cert. denied, 474 U.S. 1070 (1986); *Luckie* v. *EPA*, 752 F.2d 454, 456-457 (9th Cir. 1985) (Section 307(b) bars review of challenge to an emission standard); *United States* v. *B.F. Goodrich Co.*, 609 F. Supp. 1, 5 (W.D. Ky. 1984) (Section 307(b)(2) precludes review of vagueness challenge to regulation); *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 914 (D.C. Cir. 1979) (Section 16(a) of the Noise Pollution Control Act deprived court of jurisdiction over challenge to regulations); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 892 (8th Cir. 1977) (describing a challenge to Section 307(b)(2) as "without merit").

No court has sustained a due process objection to Section 307(b)(2), and the extra-judicial sources that petitioner cites (Pet. 41-50) fall far short of demonstrating a constitutional issue warranting this Court's review.[8] Even if the issue had generated a

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[8] Petitioner relies on the Administrative Conference's 1982 recommendations and on a law review article by Professor Currie. Pet. 41-50. Neither of those authorities, however, asserts that review preclusion provisions like Section 307(b) are necessarily unconstitutional. See 47 Fed. Reg. 58,208, 58,210

conflict among the courts of appeals, this case would be an inappropriate vehicle in which to resolve the matter. As we have noted, the issue was not adequately raised nor decided in the court of appeals. Cf. *Union Electric Co.* v. *EPA*, 427 U.S. 246, 269 n.19 (1976) (noting that this Court declined to review a due process challenge to Section 307(b) where that challenge was neither presented to nor considered by the court of appeals).

2. Petitioner contends that EPA's interpretation of its regulations and the CAA is in error. Specifically, petitioner asserts that a violation of the CAA cannot be found unless there is an emission of an air pollutant to the outside air. No court has ever accepted that argument, and the assertion is without merit.[9]

Section 112(e)(1) of the CAA grants EPA power to develop work standards for air pollutants. 42 U.S.C. 7412(e)(1). Work standards are appropriate when "it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants." 42 U.S.C. 7412(e)(1). Section 112(e)(5) expressly provides that a work practice standard is to be "treated as an emission standard" for purposes of the Act. 42 U.S.C. 7412(e)(5). Congress enacted Section 112(e)(5) following this Court's decision in

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(1982); Currie, *Judicial Review Under Federal Pollution Control Laws*, 62 Iowa L. Rev. 1221, 1259 (1977).

[9] Petitioner relies (Pet. 22, 48-49) on the initial decision in *United States* v. *MPM Contractors, Inc.*, 31 Env't Rep. Cas. (BNA) 1550 (D. Kan. 1990), to support his interpretation of the CAA. That decision, however, was vacated on the government's motion for reconsideration. 767 F. Supp. 231 (D. Kan. 1990).

Adamo Wrecking to remove any ambiguity concerning enforceability of work practice standards. See Pub. L. No. 95-623, § 13, 92 Stat. 3457.[10]

The courts have uniformly held that a violation of a work practice standard constitutes a violation of the Act. The Sixth Circuit has stated, in the context of a criminal Clean Air Act violation, that the government needs "to prove either that defendants emitted asbestos into the atmosphere *or* that they violated the work practice standards." *United States* v. *Louisville Edible Oil Products, Inc.*, 926 F.2d 584, 588 (6th Cir.) (emphasis added), cert. denied, 112 U.S. 177 (1991); see also *Sealtite Corp.*, 739 F. Supp. at 468 (failure to follow asbestos NESHAP automatically results in liability).[11]

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[10] Congress's motivation is summarized by the statement of Rep. Rogers:

> [T]he proposed legislation includes technical amendments intended to remove ambiguity about the status and enforceability of nonnumerical emission control requirements under title I of the Clean Air Act. These ambiguities were called to the Congress [*sic*] attention by the * * * decision in *Adamo Wrecking Company* * * *.
>
> These technical amendments make clear that both numerical and non-numerical emission control requirements promulgated under Section 111 or 112 of the act are enforceable by [EPA]. * * * Thus, civil or criminal enforcement action under section 113 would be authorized for violations of non-numerical emission control requirements under section * * * 112 of the act[.]

124 Cong. Rec. 31,228 (1978). For a discussion of the history of Section 112(e), see D. Currie, *Air Pollution: Federal Law and Analysis* § 3.27 (1983).

[11] The courts have also rejected arguments that the government must show visible emissions of asbestos in order to

Furthermore, petitioner's arguments ignore the purpose of the work practice standards. The work practice standards are necessary in part because measurement of asbestos emissions is technologically and economically impractical. 43 Fed. Reg. 26,372 (1978). Petitioner's argument that EPA must prove emissions into the ambient air in every enforcement action is contradicted by EPA's express finding of the impracticality of such measurements. Indeed, an express purpose of the CAA is "to assure that regulatory action can effectively prevent harm before it occurs." *Sierra Club* v. *Gorsuch*, 551 F. Supp. 785, 787 (N.D. Cal. 1982). That goal would be thwarted if the United States may enforce a prophylactic work practice requirement only in those cases in which the government can prove an actual emission. See *Tzavah Urban Renewal Corp.*, 696 F. Supp. at 1021-1022, quoting *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987).[12]

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prove a violation of the work practice standards. *United States* v. *Ben's Truck & Equipment, Inc.*, 25 Env't Rep. Cas. (BNA) 1295, 1299 (E.D. Cal. 1986) (rejecting contention that the government must prove visible emissions of asbestos occurred in order to prove a violation of 40 C.F.R. 61.147(d)); *United States* v. *MPM Contractors, Inc.*, 767 F. Supp. 231, 233 (D. Kan. 1990) (expressly rejecting assertion that dust emissions are a prerequisite to a finding that friable asbestos materials were inadequately wetted).

[12] Moreover, the district court in this case expressly found that the United States had shown by a preponderance of the evidence that petitioner had caused asbestos materials to be emitted to the outside air. Pet. App. B20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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